

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
3 BEFORE THE HONORABLE GLORIA M. NAVARRO  
4 CHIEF UNITED STATES DISTRICT JUDGE

5 UNITED STATES OF AMERICA, :  
6 Plaintiff, :  
7 vs. : No. 2:16-cr-00100-GMN-CWH  
8 JAN ROUVEN FUECHTENER, :  
9 Defendant. :  
10

11 TRANSCRIPT OF EVIDENTIARY HEARING (Day 2)  
12

13  
14 April 16, 2018

15 Las Vegas, Nevada  
16

17  
18  
19 FTR No. 7D/20180416 @ 1:34 p.m.  
20

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25 (Proceedings recorded by electronic sound recording,  
transcript produced by mechanical stenography and computer.)

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A P P E A R A N C E S

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Also Present:  
Special Agent Mari Panovich

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1 LAS VEGAS, NEVADA, APRIL 16, 2018, 1:34 P.M.

2 --oOo--

3 P R O C E E D I N G S

4

5 COURTROOM ADMINISTRATOR: All rise.

6 THE COURT: Thank you. You may be seated.

7 Sorry for the delay. I was waiting for some  
8 documents that I needed to sign. And then I decided to  
9 edit them. And now they're signed and we're done, and we  
10 can -- you have my undivided attention.

11 COURTROOM ADMINISTRATOR: This is the time set  
12 for the evidentiary hearing, day 2, in case number  
13 2:16-cr-100-GMN-CWH, United States of America versus Jan  
14 Rouven Fuechtener.

15 Counsel, please make your appearances for the  
16 record.

17 MS. ROOHANI: Good afternoon, Your Honor. Ellie  
18 Roohani and Lisa Cartier-Giroux for the United States.

19 We are joined by Special Agent Mari Panovich.

20 THE COURT: Good afternoon.

21 MS. CONNOLLY: Karen Connolly appearing with  
22 Defendant Jan Rouven Fuechtener, who is present in custody.

23 THE COURT: Good afternoon.

24 All right. So are we going to go ahead and  
25 continue? I don't remember who was up. Ms. Roohani.

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1 MS. ROOHANI: Yes, Your Honor. I had just  
2 finished my cross. I believe it's Ms. Connolly's turn.

3 I just wanted to make the Court aware.

4 Ms. Cartier-Giroux has to leave at 2:15 --

5 THE COURT: Okay.

6 MS. ROOHANI: -- for a previously scheduled  
7 appointment. We didn't want you to think she's being rude  
8 if she has to walk out.

9 THE COURT: No. You're free to go whenever you  
10 need to.

11 MS. CARTIER-GIROUX: Thank you, Your Honor.

12 THE COURT: All right.

13 So Ms. Connolly.

14 MS. CONNOLLY: I'll be very brief.

15 BENJAMIN NADIG

16 recalled as a witness, having been previously sworn,  
17 was examined and testified as follows:

18 REDIRECT EXAMINATION

19 BY MS. CONNOLLY:

20 Q. And, Mr. Nadig, if I ask you any questions I've  
21 already asked, I apologize. As you know we commenced this  
22 hearing a few weeks ago.

23 Just a couple of things I want to clarify.

24 A. I was going to say, I've been there. But can you do  
25 me a favor? Speak up. Because I'm pretty hard of hearing.

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1 Q. Okay. When I was asking you questions about who  
2 your representation was in this case, you indicated that  
3 your representation of Jan was fluid. Is that accurate?

4 A. Well, no, I said my representation of Frank was  
5 fluid.

6 Q. Representation was what?

7 A. Of Frank was fluid.

8 Q. Okay. So is your testimony you did not represent  
9 Jan?

10 A. Once again, the intent was to represent Frank. If  
11 Frank was deemed not to be -- not to create a conflict, I  
12 could support both Mike and Jess at the time of trial.

13 Q. Okay. And you had testified previously that at  
14 Frank's request you had went and you had met with Jan on a  
15 couple of occasions; correct?

16 A. That is a fair statement, yes.

17 Q. And as set forth in an e-mail you sent on September  
18 23rd -- September 3rd, 2016, you had reviewed the discovery  
19 in the case together with Michael Sanft; correct?

20 A. Not together. We had reviewed it independently.  
21 But it was his copy, yes.

22 Q. And you indicated -- so when you were talking about  
23 that you spent a significant amount of time on this case,  
24 you were referring to the case of the government against  
25 Jan; correct?

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1       A.       Well, yes. In the lens of protecting Frank, but  
2       yes.

3       Q.       Okay. And also in that e-mail, you did, in fact,  
4       indicate that you're representing Jan?

5       A.       Inartfully, yes.

6       Q.       And you also indicated in that e-mail that you  
7       represented Frank, and one of the reasons you represented  
8       Frank was because he was the person that should get blamed;  
9       correct?

10      A.       Once again, paraphrasing, but inartfully, yes.

11      Q.       Well, if you want to refresh your recollection, the  
12      e-mail is right in front of you there as Exhibit C. It's  
13      halfway down the second page.

14      A.       I'm accepting your representations as true.

15      Q.       Okay.

16      A.       I don't need to refresh my --

17      Q.       And I believe your previous --

18      A.       -- my recollection.

19      Q.       -- testimony was you never got any kind of conflict  
20      waiver from Jan or from Frank, did you?

21      A.       I don't know if I testified to that earlier, but we  
22      did not, no.

23               And to be fair, to finish that question --

24      Q.       Okay. I don't need --

25      A.       Well, I would just like to finish my answer, which

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1 is that --

2 Q. Well, you answered my --

3 A. -- Frank --

4 Q. You answered my question, so --

5 A. All right.

6 Q. Thank you.

7 And you've also -- and I believe we went over  
8 this previously, you met with one of Jan's experts in this  
9 case?

10 A. Are you talking about the computer expert?

11 Q. That was Mr. --

12 A. I don't know what you're talking about. I was not  
13 there for that meeting.

14 Q. Mr. Marchese was unavailable, he was out of town,  
15 there was an expert, and you met with that expert; right?  
16 Does that refresh your --

17 A. No --

18 Q. -- recollection?

19 A. -- that is incorrect. That was the individual who  
20 went to the house.

21 Mr. Sanft was there for the individual who went  
22 to the house. I know because I received photographs of  
23 various things from Mr. Sanft --

24 Q. So -- so -- okay. Let me --

25 A. -- at Jan's house.

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1 Q. So you never met with any of the defendant's  
2 experts?

3 A. I did not meet with that expert. I don't recall any  
4 other experts, no.

5 I was not involved in that portion of the  
6 case --

7 Q. So your testimony is you don't recall meeting with  
8 any defense expert?

9 A. No, that's not what I'm saying. I'm saying I don't  
10 recall --

11 Q. Okay.

12 A. -- meeting with them.

13 Q. Now, in this e-mail you indicated -- you made the  
14 statement on the very last paragraph where you indicated  
15 that Jan will be found guilty.

16 A. Yes. And I believed that to --

17 Q. What did --

18 A. -- be true.

19 Q. -- you mean by that?

20 A. My understanding is that --

21 Q. This is prior to trial, right, in September of 2016?

22 MS. ROOHANI: Your Honor --

23 THE WITNESS: I'm looking --

24 MS. ROOHANI: -- I'm going to --

25 THE WITNESS: -- at it --



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1 MS. ROOHANI: -- object based on relevance. I  
2 don't see how that's relevant at this point.

3 THE COURT: Ms. Connolly?

4 MS. CONNOLLY: I believe that it's going to  
5 follow into my next questions which would relate to, When  
6 you spoke with Jan, what did you discuss?

7 So his belief and what he communicated in this  
8 communication which was forwarded to Jan in addition to a  
9 subsequent meeting he had with Jan.

10 THE COURT: Do you want to know the number of  
11 times or the lengths of times that --

12 MS. CONNOLLY: Okay.

13 BY MS. CONNOLLY:

14 Q. You met --

15 THE COURT: -- is that what --

16 BY MS. CONNOLLY:

17 Q. After this e-mail, do you recall meeting with Jan  
18 after -- or you sent this e-mail to Frank; right?

19 A. Correct.

20 Q. And you also sent it to Mr. Pacitti and Mike Sanft?

21 A. That is correct.

22 Q. And are you aware that -- whether or not this e-mail  
23 was provided to Jan?

24 A. After the fact, clearly -- I don't know if the  
25 e-mail was provided, but clearly he had a conversation with

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1 Frank about it.

2 Q. And I believe also previously we discussed -- if you  
3 look at Exhibit E in front of you, it's an e-mail from  
4 yourself to Mr. Marchese.

5 A. Exhibit what?

6 Q. Exhibit E?

7 A. Okay.

8 Q. And in that you reference yourself as having been a  
9 former member of the defense team; right?

10 A. Yes.

11 MS. CONNOLLY: Court's indulgence.

12 BY MS. CONNOLLY:

13 Q. You had a meeting with Mr. -- with Jan, and after  
14 your meeting with Jan, Mr. Sanft was put back on the case.  
15 Are you familiar with that? Or does that refresh your  
16 recollection?

17 A. Yes.

18 Q. Okay. Did you have a discussion with Jan about  
19 putting Mr. Sanft back on the case?

20 A. It was more of Jan suggesting he was more  
21 comfortable with Mr. -- Mike on the stand -- on the case.

22 Q. And so when did that discussion take place?

23 A. I don't recall.

24 Q. Okay. Would it be fair to say shortly prior to  
25 trial?

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1       A.       To be fair, I think it's closer in time to this  
2 e-mail, the September 21st e-mail, than it was to the time  
3 of trial.

4       Q.       Would it be fair to say that this -- are you aware  
5 of whether or not Jan was alone when he received this  
6 e-mail?

7       A.       I don't --

8               MS. ROOHANI: Your Honor, I'm sorry. I don't  
9 think that Mr. Nadig has the -- can get into  
10 Mr. Fuechtener's head, unless he has specific knowledge  
11 about what he said, in which case that's hearsay, and he  
12 can't testify to that.

13              MS. CONNOLLY: I wasn't asking for his notes.

14              THE COURT: So do you want to just rephrase the  
15 question then --

16              MS. CONNOLLY: Okay.

17              THE COURT: -- so it's --

18 BY MS. CONNOLLY:

19       Q.       So -- and did you -- do you recollect meeting with  
20 him after this -- as a result of this e-mail or after this  
21 e-mail?

22       A.       Yes.

23       Q.       Okay. And when you met with him, you didn't contact  
24 Mr. Marchese and request his permission to meet with Jan,  
25 did you?

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1 A. No, I did it at Frank's request.

2 Q. Okay. And during that, there was discussion about  
3 the defense team?

4 A. No. It was a question of whether Mike would come  
5 back on.

6 Q. Okay. And you encouraged him to bring Mr. Sanft  
7 back on; right?

8 A. I suggested that Mike would be a benefit, yes.

9 Q. And did you tell him that you were concerned that he  
10 was going to get convicted with the current defense team  
11 that he had?

12 A. That's not what I said. I said with the defense  
13 theory, as I had known it, I thought it was a losing  
14 theory.

15 Q. Okay. And who had made you aware of what the  
16 defense theory was?

17 A. Both Mike and Jess had let me know at various points  
18 that -- you know, what the theory was.

19 Q. So you had discussions with both Mr. Sanft and  
20 Mr. Marchese about what Mr. Rouven's defense was going to  
21 be at trial?

22 A. Yes.

23 Q. And in that September meeting, or right about  
24 September, you communicated to him that you didn't have a  
25 whole lot of faith in that?

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1 A. I thought it was problematic, yes.

2 Q. And you suggested he should bring Mr. Sanft back on?

3 A. I -- once again, he said he would be more  
4 comfortable with Mike coming on. I just, once again, said  
5 the theory was what was problematic.

6 Q. And you and Mr. Sanft were retained. You are the  
7 one who brought Mr. Sanft on the case initially; right?

8 A. No, we were both retained at the same time.

9 Q. Okay. And that was as a referral from Mr. Pacitti?

10 A. Yes.

11 Q. Now, in the e-mail you made the comment to Frank  
12 that if Jan were to be in the best possible position going  
13 forward that Frank should contact you?

14 A. That's a fair statement.

15 Q. Would it be fair to say that Frank did contact you?

16 A. Yes, he did.

17 Q. And as a result of that, you went to meet with Jan?

18 A. After discussing -- and I don't want to get into  
19 what I spoke with Frank about, but after that conversation,  
20 I met with Jan.

21 Q. Okay. So what did you mean -- when you met with Jan  
22 at Frank's request, did you discuss with him what you meant  
23 in that letter when you said "If Jan wants to be in the  
24 best possible position going forward, contact me"?

25 A. Can you reask that? I had a brain fart right in the

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1 middle of that question. I apologize.

2 Q. One more time?

3 A. I said I didn't --

4 Q. Okay. When you met -- wet -- when you met with Jan,  
5 were you aware that Jan had -- whether or not Jan had  
6 received a copy of your e-mail?

7 A. No.

8 Q. Okay. Did you -- when you met with him, did you  
9 discuss the e-mail?

10 A. Yes.

11 Q. Okay. And did you explain to him why you made some  
12 of the comments you made in that e-mail?

13 A. Well, yes.

14 Q. And what did you tell him?

15 A. It was more -- the way you are presenting it would  
16 suggest that I was driving the conversation, which was not  
17 the case.

18 Q. Well, just answer the question, please.

19 A. I am answering the question.

20 Q. No, you're not.

21 I didn't ask you an explanation why you said  
22 what you said, I asked, What did you say to him about your  
23 e-mail and comments you made in the e-mail?

24 A. He asked -- he said, and I remember this vividly, he  
25 said, "This is a mess, you know, why did I get rid of

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1 Mike?"

2 That was how the conversation began.

3 Q. Okay.

4 A. And then I don't remember the specifics, but we  
5 talked about the theory of the case and my belief in the  
6 issues in the theory of the case.

7 Q. So you disagreed with -- you expressed to him that  
8 you disagreed with what his main core of his defense team  
9 intended to do at trial?

10 MS. ROOHANI: Your Honor, I believe that's been  
11 asked and answered now four times since we started here  
12 today.

13 MS. CONNOLLY: I can withdraw the question.  
14 That's fine.

15 THE COURT: All right. Overruled.

16 THE WITNESS: Then I should answer it.

17 And, yes, I did discuss my concerns with what I  
18 believed their theory of the case was, yes.

19 BY MS. CONNOLLY:

20 Q. And was -- without telling us what he said, how did  
21 Jan react?

22 A. I don't -- I mean, I -- without telling us what Jan  
23 said about the theory of the case -- I don't understand the  
24 question, I guess, is what --

25 Q. Was he upset when you told him that you didn't agree

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1 with the defense that was being put on by the Marchese  
2 team?

3 A. He was more questioning than upset is what I would  
4 call it.

5 Q. He wasn't happy to hear it, what you were telling  
6 him; right?

7 A. He wasn't surprised to hear it either.

8 Q. Did you make any comment to him about Amber Craig's  
9 removal from the defense team?

10 A. To be fair, I didn't know that much about it.

11 Q. You didn't discuss that with him?

12 A. I might have in passing. I don't remember  
13 everything we talked about.

14 Q. Do you remember making any comments that it was an  
15 indication of the incompetence of the defense team that she  
16 got on and then got removed?

17 A. It -- as you phrase it, no.

18 Q. Okay. Well, how would you say what was discussed in  
19 regard to that?

20 A. And, once again, I don't recall exactly, so I --  
21 speculating, it was something to the effect of, like, you  
22 know, they brought somebody on the case who had already  
23 been involved with the case, you know, and so  
24 (indiscernible) in a fashion even though they were excluded  
25 from the case, something like that. And that's, once



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1 again, me really paraphrasing.

2 Q. You certainly didn't put a positive spin on her  
3 removal, did you?

4 A. Well, I like Amber. But if she's excluded from the  
5 case, that's a pretty big error.

6 Q. And that's at calendar call, to your knowledge, are  
7 you aware this happened?

8 A. I don't know when it happened.

9 MS. CONNOLLY: I don't have anything else.  
10 Thank you.

11 THE COURT: Ms. Roohani?

12 MS. ROOHANI: One brief follow-up question.

13 RECROSS-EXAMINATION

14 BY MS. ROOHANI:

15 Q. Mr. Nadig, you were in the middle of answering your  
16 question regarding this waiver, and Ms. Connolly cut you  
17 off. Can you complete your answer.

18 A. Can -- specifically what was that?

19 Q. Regarding the waiver?

20 A. Oh, the conflict waiver?

21 Q. Yes.

22 A. I told Frank throughout this entire process, and  
23 obviously this doesn't violate attorney-client privilege,  
24 otherwise I wouldn't bring it up, that my primary  
25 responsibility was to him and if there were any issues, I

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1 wouldn't necessarily advise me talking to Jan.

2 Q. And based upon your training as a defense attorney,  
3 was there a possible defense that would not create a  
4 conflict between Frank and Jan?

5 A. Initially, potentially, yes.

6 MS. CONNOLLY: Objection. Speculation and  
7 relevance.

8 MS. ROOHANI: Your Honor, she's gotten into the  
9 waiver and has made a big deal about the fact that there  
10 was a conflict here.

11 And ultimately if there was a situation where  
12 there wouldn't be a conflict, it's certainly relevant and  
13 not speculation because he must have thought about it.

14 THE COURT: Overruled.

15 BY MS. ROOHANI:

16 Q. And I believe that you had previously indicated on  
17 cross that you received an oral waiver both from Jan and  
18 Frank?

19 A. Definitely.

20 Q. Okay.

21 A. On more than one occasion.

22 Q. Okay. And that was the basis upon which Frank had  
23 asked you to go and speak with Jan --

24 A. Correct.

25 Q. -- in September?

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1 MS. ROOHANI: I have no further questions, Your  
2 Honor.

3 MS. CONNOLLY: Briefly, Your Honor?

4 THE COURT: Yes.

5 FURTHER REDIRECT EXAMINATION

6 BY MS. CONNOLLY:

7 Q. Following up on that, again, in that e-mail you  
8 indicated "One of the reasons I represented you is that you  
9 are the person who should be blamed." Right?

10 A. Sure.

11 Q. Okay. So if your client, Frank, was the one that  
12 you shot -- thought should be blamed for this pornography  
13 that was on a computer, it would be -- clearly be a  
14 conflict for you to go and then have discussed the case  
15 with Jan, the individual who is charged with placing  
16 pornography on the computers; correct? Would you agree  
17 with that?

18 A. I do sometimes what my clients direct.

19 Q. My question was, would you agree with the scenario I  
20 just presented to you? That both lived in the same house;  
21 right?

22 A. Yes.

23 Q. Okay. And there was pornography found on computers  
24 in that home; right?

25 A. Yes.

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1 Q. To computers that both Jan and Frank had access to;  
2 right?

3 A. I believe so. There might have been one or two  
4 that --

5 Q. The majority of which they --

6 A. -- were password --

7 Q. -- both had access?

8 A. Yes.

9 Q. Okay. And Jan is charged with the one who is  
10 responsible for the pornography on those computers?

11 A. Correct.

12 Q. And the ultimate suspect, you would agree, would be  
13 Frank because he lived in the house with Jan; right?

14 A. He did live in the house with Jan.

15 Q. And, in fact, in your letter you indicated that he  
16 was a more likely suspect because he had a predilection for  
17 younger individuals; right?

18 A. That is a fair statement.

19 Q. Then you would agree that it would be a conflict in  
20 you representing both Jan and Frank under that scenario?

21 A. Under your scenario, theoretically, yes.

22 MS. CONNOLLY: Thank you.

23 MS. ROOHANI: One follow-up, Your Honor.

24 THE COURT: All right.

25

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1                                   FURTHER RECROSS-EXAMINATION

2       BY MS. ROOHANI:

3           Q.       There was also a possible defense that it was  
4       somebody else that wasn't Jan or Frank; correct?

5           A.       Correct. There were at least two other people who  
6       had been living at the house during that period of time.  
7       And there had been a preliminary investigation as to those  
8       individuals.

9                   By the time Mike got back on the case, I don't  
10       know if that was followed up on. But, yes, initially there  
11       was discussion of other people having done this work.

12          Q.       And you weren't present at trial?

13          A.       I was not.

14          Q.       You weren't aware of the defense that was put on at  
15       trial?

16          A.       At the time of trial, I was not. Once Mike got back  
17       on the case, I did not, because I did not have any contact  
18       with them regarding their strategy of the case.

19          Q.       And at the time that the government had charged --  
20       or indicated that we believed that Frank was an unindicted  
21       co-conspirator, did you have any other contact with the  
22       defense team regarding this case?

23          A.       Once it was determined that Frank was a potential  
24       co-conspirator, I had no contact with the defense team.

25          Q.       Because at that point the conflict became concrete?

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1 A. Yeah, definitely, it's apparent.

2 MS. ROOHANI: No further questions.

3 FURTHER REDIRECT EXAMINATION

4 BY MS. CONNOLLY:

5 Q. Again, that e-mail we were referencing when you  
6 indicated that the main suspect should be Frank is dated  
7 September 26, 2016; right?

8 A. I have --

9 Q. I'm -- yeah, actually September --

10 A. What exhibit are we looking at?

11 Q. -- 3rd. It's Exhibit C.

12 A. Okay. Exhibit C shows a date of -- and tell me if  
13 I'm wrong -- September 3rd, 2016.

14 Q. Okay. And then, to your recollection, are you aware  
15 that the indictment came down in about March of 2016?

16 A. Yes, there was an indictment in March --

17 Q. And trial proceeded in November 2016?

18 A. That is correct.

19 Q. So two months before trial you still believed that  
20 it was Frank who should have been blamed; right?

21 A. I --

22 Q. Based on that e-mail?

23 A. I think that he was a valid suspect.

24 Q. Excuse me?

25 A. I think he was definitely a valid suspect.

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1 MS. CONNOLLY: Thank you.

2 THE COURT: Anything else --

3 MS. ROOHANI: Nothing further, Your Honor.

4 THE COURT: -- Ms. Roohani? All right.

5 Thank you for coming in, Mr. Nadig.

6 THE WITNESS: Thank you.

7 MS. CONNOLLY: Steve Pacitti.

8 THE COURT: All right.

9 COURTROOM ADMINISTRATOR: Please raise your  
10 right hand.

11 You do solemnly swear that the testimony you  
12 shall give in the cause now before the Court shall be the  
13 truth, the whole truth, and nothing but the truth, so help  
14 you God?

15 THE WITNESS: I do.

16 COURTROOM ADMINISTRATOR: Thank you, sir. You  
17 may be seated.

18 Please state and spell your full name for the  
19 record.

20 THE WITNESS: Steven Pacitti, P-a-c-i-t-t-i.

21

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1

STEVEN PACITTI

2

called as a witness on behalf of the

3

Defense, was examined and testified as follows:

4

DIRECT EXAMINATION

5

BY MS. CONNOLLY:

6

Q. Good afternoon, Mr. Pacitti. How are you employed?

7

A. I'm a self-employed attorney.

8

Q. Okay. And what is your area of practice?

9

A. Transactions, corporate, tax, entertainment.

10

Q. Any experience in criminal law?

11

A. Clerking when I was in law school.

12

Q. Okay. Any experience in federal criminal defense?

13

A. No.

14

Q. Okay. Are you familiar with the gentleman in the

15

beautiful yellow jumpsuit?

16

A. Yes, I am.

17

Q. And how do you know him?

18

A. Jan and Frank were clients of mine for their show at

19

the Tropicana.

20

Q. Okay. When did -- when did you first become the

21

attorney for Jan?

22

A. I have no recollection. Probably four or five years

23

ago.

24

Q. Okay. And how would you describe the relationship

25

you had with Jan?



~~TRANSCRIBED FROM DIGITAL RECORDING~~

1 A. Very friendly.

2 Q. Very what?

3 A. Friendly.

4 Q. Okay. And you became aware that he was -- or you  
5 became -- early January 2016, did you become aware that  
6 there was some police activity at the home he shared with  
7 Frank?

8 A. Yes.

9 Q. Okay. And as a result of that, did you contact or  
10 suggest that he hire any particular attorneys to represent  
11 him in a subsequent indictment related to that activity?

12 A. I'd originally suggested that he talk to Ben Nadig.  
13 They weren't -- he wasn't -- asked for another referral,  
14 and I sent him to Jess Marchese.

15 Q. Do you know timing-wise when you made the Nadig  
16 referral versus the Marchese?

17 A. No, I don't remember.

18 Q. Okay. But it wasn't the same time?

19 A. No.

20 Q. Would it be fair to say that when Jan had expressed  
21 some discontent with Nadig, that's when you made the  
22 Marchese referral?

23 A. Yes.

24 Q. If the indictment came down in March of 2016, do you  
25 have any recollection when you think it was you referred

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1 him to Marchese?

2 A. No, I have no recollection.

3 Q. Did you --

4 A. It would have been right -- oh, Marchese? I don't  
5 know when Marchese would have been. But the Nadig would  
6 have been right after the raid.

7 Q. And did you make a recommendation of Mike Sanft, or  
8 was that --

9 A. No.

10 Q. Okay. So you made the recommendation of Nadig, and  
11 then when he had -- Jan expressed some discontent, you  
12 recommended Marchese?

13 A. Yes.

14 Q. Okay. Were you aware there was any -- what is your  
15 understanding of who was actually representing Jan?

16 A. Who was representing Jan?

17 Q. Who was representing him, yes.

18 A. I don't really know. But I know the attorneys were  
19 having some discussion about who is representing who.

20 I kind of made the intro -- I was at the meeting  
21 for the initial introduction, and after that I kind of let  
22 them do their own thing.

23 Q. Were you aware if there was any kind of strife or  
24 dissension among the lawyers who were representing him?

25 A. I know there was some kind of -- there was some kind

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1 of disagreement among them. Because I don't have any dog  
2 in the fight, and I don't really generally have any input  
3 in that, I just kind of let it go and ignored it.

4 Q. So you didn't get involved with it?

5 A. No, not at all.

6 Q. Okay. Let me fast forward a little bit to the --  
7 prior to trial, did you have any meetings with Jan, or did  
8 you have any discussion with him about his exposure under  
9 the federal sentencing guidelines or under the federal  
10 statutes for the --

11 A. No.

12 Q. -- activity in which he had been charged?

13 A. No.

14 Q. Okay. And you were present for the trial; right?

15 A. I think I was there one day.

16 Q. Okay.

17 A. I wasn't there for the whole trial, no.

18 Q. Okay. And there came a point in time when you were  
19 actually sitting with him at defense table, right, during  
20 a -- was it during a break or was there some discussions  
21 about --

22 A. No, I never sat with him at the defense table.

23 Q. Okay. You were aware that at -- midway -- or were  
24 you sitting through the trial when the government was  
25 presenting its case?

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1 A. When they rested, I was there that day.

2 Q. Okay. And you were aware -- are you aware of  
3 whether or not there was some discussions after the  
4 government rested its case about resolving the case by way  
5 of a plea agreement?

6 A. Yes.

7 Q. Okay. And were you involved in those discussions  
8 with the government?

9 A. Yes. We weren't at the defense table. We were at a  
10 room somewhere.

11 Q. Okay. So when I asked you previously if you were at  
12 the defense table, you were at the defense table when there  
13 was discussions about the proposed guilty plea; right?

14 A. Correct. That's what I was clarifying.

15 Q. But there was no actual -- on the day that you had  
16 discussions at the defense table with Jan, who was present  
17 from the defense perspective?

18 A. Jess Marchese, Ben, and Jan, I think.

19 Q. Okay. And there was no actual plea agreement  
20 presented; right?

21 A. No. It had just been an offer that the state --  
22 that the US Attorney had just made an offer, and it was  
23 just being discussed generally.

24 Q. And your understanding was -- of the offer, was that  
25 the judge had the discretion to give him a sentence of 5 to

—TRANSCRIBED FROM DIGITAL RECORDING—

1 15; right?

2 A. That the -- my understanding was that the charge  
3 that carried the 15-year minimum was being dropped, leaving  
4 only the charges with 5-year minimum.

5 Q. Okay. And you represented to Jan that would be  
6 within -- let me ask you.

7 You've known him for quite some time. He speaks  
8 English; right?

9 A. Yes.

10 Q. It's not his first language?

11 A. Yes.

12 Q. Okay. Is he -- you had indicated to me previously  
13 that he speaks English, but he doesn't necessarily have an  
14 understanding for all the nuances in the language?

15 A. I don't know how -- what he understands for the  
16 nuances. I deal with a lot of -- in the entertainment  
17 practice, I deal with a lot of nonEnglish speaking people.

18 And you're never quite sure -- they're really  
19 good at faking, but you're never quite sure how big their  
20 vocabulary really is.

21 Q. Okay. And so I just want to talk specifically about  
22 Jan.

23 So -- so do you remember having a discussion  
24 with him where you indicated that it would be within the  
25 judge's discretion, he could potentially get 5 to 15?

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1 A. Well, the discussion was -- that I recall was, when  
2 the charge --

3 Q. I'm asking about what you said to him?

4 A. Yeah, I said that "In the judge's discretion" --  
5 there was a lot of discussion about the judge's discretion.

6 So I said, "In the judge's discretion, if the  
7 judge was so inclined, she could sentence you for something  
8 less than 15 years."

9 Q. Okay. And you mentioned that -- you mentioned five  
10 years to him, that in her discretion --

11 A. Right, because --

12 Q. -- she could give him five years?

13 A. -- that would be the minimum of the remaining  
14 charges. So there could be -- in the judge's discretion,  
15 it would be permissible for her to sentence him to  
16 somewhere between 5 and 15.

17 Q. Okay. During those discussions, was there any  
18 discussions about the United States Sentencing Guidelines?

19 A. No.

20 MS. CONNOLLY: I don't have anything else.  
21 Thank you.

22 THE COURT: Ms. Cartier-Giroux.

23 CROSS-EXAMINATION

24 BY MS. CARTIER-GIROUX:

25 Q. Good afternoon, Mr. Pacitti.

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1 A. Good afternoon.

2 Q. I just have a few questions for you.

3 When you worked in the -- in the civil realm  
4 with Jan and Frank, who did you deal with usually in terms  
5 of the contract discussions and negotiations?

6 A. Frank, primarily, but Jan was usually involved, yes.

7 Q. Okay. In terms of the discussions about things, was  
8 it Frank that was usually --

9 A. Frank was --

10 Q. -- in charge --

11 A. -- clearly the businessman, yes.

12 Q. Okay. So you really don't have a basis -- is it  
13 fair to say you don't really have a basis to assess whether  
14 or not Jan could understand what his plea agreement was or  
15 not understand? Is that fair?

16 A. I've never seen the plea agreement, so I don't know  
17 how involved the language is.

18 But I -- like I said, I don't know what his  
19 ability to read, I don't know what his ability to  
20 interpret, I don't know any of those things.

21 Q. So you would be guessing, is that --

22 A. Yes.

23 Q. -- fair to say?

24 A. It would be pure conjecture.

25 Q. Okay. And have you ever seen the plea agreement in

~~TRANSCRIBED FROM DIGITAL RECORDING~~

1 this case?

2 A. No.

3 Q. And you already indicated that you're not -- you  
4 don't practice criminal law, so you're not really familiar  
5 with the sentencing guidelines?

6 A. No.

7 Q. But you were present at least to some discussion  
8 about the mandatory minimum in this case?

9 A. Yes. And that is what -- Jess would discuss what  
10 was the -- kind of the nuts and bolts of the offer. And  
11 then I would say, "From what I'm hearing" and try to  
12 interpret it or make it more concrete, something like that.

13 Q. Okay.

14 A. But I always started out with, "What I'm hearing  
15 from your attorney." I would say, "From what I'm hearing,"  
16 then I would make a statement.

17 Q. Okay. And you never met with Jan to discuss the  
18 criminal matters without the other attorneys, the criminal  
19 lawyers present; correct?

20 A. I probably had discussions with him because he would  
21 constantly say, "I'm not into that, I'm not into that, I'm  
22 not into that."

23 Q. Okay. But in terms of this sentence --

24 A. No.

25 Q. -- did you discuss it outside the presence of his



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1 criminal attorneys?

2 A. No.

3 Q. And were you present when he pled guilty?

4 A. Excuse me?

5 Q. Were you present when he pled guilty?

6 A. No.

7 MS. CARTIER-GIROUX: I don't have any other  
8 questions. Thank you, sir.

9 MS. CONNOLLY: Just very briefly.

10 THE COURT: Ms. Connolly?

11 REDIRECT EXAMINATION

12 BY MS. CONNOLLY:

13 Q. You indicated -- I'm sorry. You indicated that you  
14 were interpreting for Jan what the attorneys were saying.  
15 So, in other words, you were trying to put it into layman's  
16 terms?

17 A. Perspective, yes, yes.

18 Q. And you did that because you felt he needed that?

19 A. Sometimes lawyers have a tendency to speak in their  
20 own language. And as lay- -- if I -- I would consider  
21 myself in criminal law to be more of a layperson. I  
22 consider myself more like Jan than Jess.

23 So it was something that I -- if I heard him say  
24 something and I could simplify it and say it the way a  
25 layperson would say it, I think I was in a position to do

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1     that, yes.

2     Q.     And, again, you wouldn't have done that if you  
3     didn't think it was helpful?

4     A.     Correct.

5             MS. CONNOLLY: Thank you.

6             MS. CARTIER-GIROUX: Very quickly.

7                     RE CROSS-EXAMINATION

8     BY MS. CARTIER-GIROUX:

9     Q.     Now, you don't -- do you speak German?

10    A.     No.

11    Q.     Okay. So when you say you were interpreting,  
12    basically you were just reiterating in a different fashion  
13    the same thing in English what his attorneys were saying?

14    A.     In the context of a bilingual discussion,  
15    interpretation is probably a bad word. It's probably more  
16    simplifying.

17    Q.     Okay. And you never indicated to him that he could  
18    get less than five years --

19    A.     No.

20    Q.     -- correct?

21    A.     No.

22    Q.     So it's very clear that five years was a mandatory  
23    minimum in this case as far as the discussions you  
24    witnessed?

25    A.     Yes.

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1 MS. CARTIER-GIROUX: I don't have any other  
2 questions.

3 FURTHER REDIRECT EXAMINATION

4 BY MS. CONNOLLY:

5 Q. Do you remember making the comment that he could get  
6 out when he was 43?

7 A. There would have been some math, yeah. I would have  
8 said if it was -- if he was 38 at the time, and I'm trying  
9 to remember how old he was, and say, so let's say one of  
10 the things to make something concrete, I would have said if  
11 he -- "If she could, in her discretion, if she decided to  
12 sentence you for five years, you would be 43; whereas if  
13 you went through and were found guilty of the crime with a  
14 minimum of 15 years, you would get out at 53."

15 MS. CONNOLLY: Okay. Thank you.

16 FURTHER RECROSS-EXAMINATION

17 BY MS. CARTIER-GIROUX:

18 Q. But you never told him he was going to get five  
19 years?

20 A. No, no, no, no.

21 MS. CARTIER-GIROUX: Thank you.

22 MS. CONNOLLY: I don't have anything else.

23 THE COURT: All right. Thank you, Mr. Pacitti.

24 MS. CONNOLLY: Mr. Durham.

25 COURTROOM ADMINISTRATOR: Please remain standing

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1 and raise your right hand.

2 You do solemnly swear that the testimony you  
3 shall give in the cause now before the Court shall be the  
4 truth, the whole truth, and nothing but the truth, so help  
5 you God?

6 THE WITNESS: Yes.

7 COURTROOM ADMINISTRATOR: Thank you, sir. You  
8 may be seated.

9 Please state and spell your full name for the  
10 record.

11 THE WITNESS: Benjamin Durham, B-e-n-j-a-m-i-n,  
12 last name D-u-r-h-a-m.

13 BENJAMIN DURHAM

14 called as a witness on behalf of the  
15 Defense, was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MS. CONNOLLY:

18 Q. Mr. Durham, how are you employed?

19 A. I'm sorry?

20 Q. How are you employed?

21 A. I'm an attorney.

22 Q. And what kind of practice?

23 A. Primarily criminal defense.

24 Q. Okay. And when were you first licensed to practice  
25 law in Nevada?

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1 A. 2001.

2 Q. Okay. Do you, in your practice, practice federal  
3 criminal defense?

4 A. Yes.

5 Q. Okay. Have you ever gone to trial on a child  
6 pornography case?

7 A. Are you speaking about this one?

8 Q. No, not including this case.

9 A. No.

10 Q. Okay. How many child pornography cases have you  
11 represented defendants on in federal court?

12 A. I couldn't tell you off the top of my head, but I  
13 would say --

14 Q. Less than 10?

15 A. Yes.

16 Q. Okay. And how many child pornography cases have you  
17 been involved in plea agreements on?

18 A. Probably the same.

19 Q. You don't know -- do you know a number?

20 A. I couldn't tell you.

21 Q. Okay. Could it be one?

22 A. It could be.

23 Q. How do -- do you know the individual sitting in  
24 yellow?

25 A. Jan.

—TRANSCRIBED FROM DIGITAL RECORDING—

1 Q. How do you know him?

2 A. I worked on his case.

3 Q. Okay. And you're one of the attorneys that  
4 represented Jan for a trial which took place in  
5 approximately November of 2016; right?

6 A. Correct.

7 Q. And you came on the case in July of 2016?

8 A. That sounds right.

9 Q. Okay. And you were substituted in in place of  
10 Michael Sanft; is that accurate?

11 A. Correct.

12 Q. Okay. And did you stay on the case from July  
13 through trial?

14 A. I did.

15 Q. Okay. In what capacity? Were you lead attorney or  
16 backup attorney? Or what was your understanding of your  
17 involvement in the case?

18 A. I guess I was like a second chair.

19 Q. Second chair to Mr. Marchese?

20 A. Correct.

21 Q. Okay. And the facts of this case involved child  
22 pornography on computers; right?

23 A. Right.

24 Q. Thousands of images; right?

25 A. Right.

~~TRANSCRIBED FROM DIGITAL RECORDING~~

1 Q. Did you ever go and review those images?

2 A. The actual images?

3 Q. Yes.

4 A. I did go to an office that was over off of -- near  
5 the 215 and Gillespie, I think.

6 Q. Okay.

7 A. And I reviewed -- I didn't review all the images,  
8 but I did review some of them with --

9 Q. There was a huge volume of videos --

10 A. There was.

11 Q. -- and images.

12 Fair to say you didn't go through all of those?

13 A. No.

14 Q. Was somebody else -- was -- and we heard testimony  
15 that you guys pulled straws, so to speak, and somebody else  
16 was assigned to go and review those videos.

17 Does that sound familiar to you?

18 A. I don't remember that.

19 Q. You don't specifically recall doing it, other than  
20 going over there that one time?

21 A. I remember going over that one time, yeah.

22 Q. How much time did you spend reviewing materials on  
23 that particular occasion?

24 A. It was a couple hours.

25 Q. Now, prior to trial, did you have -- you never had

~~TRANSCRIBED FROM DIGITAL RECORDING~~

1 any discussions with Jan about any kind of plea in this  
2 case, did you?

3 A. No, not that I recall.

4 Q. Okay. And prior to trial, you don't recall going  
5 over -- I would anticipate since there was no plea on the  
6 table, and he didn't indicate he wanted to plea, you didn't  
7 go over the federal sentencing guidelines with him?

8 A. Correct.

9 Q. Now, you were present during trial, and at some  
10 point during trial, after the state -- after the government  
11 had rested its case, there was discussions about taking a  
12 negotiation in the case?

13 A. Correct.

14 Q. Now, was it fair to say that Mr. Marchese was the  
15 one that brokered that deal with the government, or were  
16 you involved also?

17 A. I think that was him, yeah. I don't recall  
18 having -- being part of a plea negotiation.

19 Q. Okay. So the negotiations, to your recollection,  
20 were between Jess Marchese and one of the government  
21 attorneys?

22 A. Yeah. I think Mike Sanft might have been present,  
23 but I couldn't tell you for sure.

24 Q. You were the attorney that -- let me strike that.

25 There was no -- on the day there was plea



~~TRANSCRIBED FROM DIGITAL RECORDING~~

1 negotiations in court, there was no actual plea agreement  
2 proffered until the next day; is that true?

3 A. That's my understanding, my recollection.

4 Q. Do you remember when you first got -- or when did  
5 you first understand the terms of the negotiation?

6 A. I don't remember if it was later that night or the  
7 next morning.

8 Q. Okay. Now, you didn't go meet with Jan the evening  
9 after the state rested its case, did you?

10 A. No. I met with him the following morning.

11 MS. ROOHANI: Your Honor, just to be clear, we  
12 hadn't rested. I recognize that that's probably the easier  
13 way to refer to it. But we had not closed our case in  
14 chief. So I just want to make sure that the record is  
15 clear in terms of that.

16 MS. CONNOLLY: After Agent Panovich's testimony.

17 MS. ROOHANI: She was not finished with her  
18 testimony.

19 MS. CONNOLLY: Oh, okay. That was my  
20 understanding. I guess that was incorrect.

21 BY MS. CONNOLLY:

22 Q. After Agent Panovich had left the stand on that  
23 particular day and there was conversations about a guilty  
24 plea, and you didn't receive a copy of the guilty plea  
25 until the next morning, to the best of your recollection?

TRANSCRIBED FROM DIGITAL RECORDING

1 A. Correct.

2 Q. Okay. And do you remember what time you received  
3 that guilty plea agreement?

4 A. I don't.

5 Q. Okay. Do you remember how you came in possession of  
6 a copy of the guilty plea agreement?

7 A. It was e-mailed to me.

8 Q. By whom?

9 A. I don't remember for sure -- I don't remember if the  
10 government e-mailed me and Jess or if Jess forwarded it to  
11 me.

12 Q. Okay. But you came over to the holding facility  
13 here at the federal court and -- with a copy of the guilty  
14 plea agreement?

15 A. Yes.

16 Q. Okay. And fair to say then you met with Jan?

17 A. Yes.

18 Q. Okay. And you met with him in one of the little  
19 anterooms?

20 A. Yes.

21 Q. Okay. And there was a screen separating you and  
22 Jan?

23 A. Yes.

24 Q. Okay. Do you recall whether or not Jan had a copy  
25 of the guilty plea agreement?

~~TRANSCRIBED FROM DIGITAL RECORDING~~

1       A.       I don't remember if -- if the marshal came and  
2 brought it around to him or not.

3       Q.       Okay. There was previous testimony that you were  
4 the individual that went over the guilty plea agreement  
5 with him. Is that accurate?

6       A.       Yes.

7       Q.       Okay. So this guilty plea agreement is  
8 approximately 17 pages long; correct?

9               It's right --

10      A.       If you say so.

11      Q.       It's right in front of you up there. It's not  
12 marked as an exhibit, but as a courtesy.

13      A.       Okay.

14      Q.       So if you could just grab that, because I'm going  
15 to --

16      A.       Got it.

17      Q.       -- ask you some questions about it.

18      A.       Okay.

19      Q.       So the guilty plea agreement is 17 pages long?

20      A.       Okay.

21      Q.       Right?

22      A.       Yes.

23      Q.       Okay. So you were on one side -- at one portion of  
24 the room, there was a partition between you, and Jan was on  
25 the other side of the partition; right?

~~TRANSCRIBED FROM DIGITAL RECORDING~~

1 A. Yes.

2 Q. Who else was -- when you went over the guilty plea  
3 agreement with him, who else was in the room?

4 A. From what I recall, I started going over it with  
5 him, and then Jess Marchese arrived shortly after.

6 Q. Would it be fair to say Jess was going in and out?  
7 Do you recall?

8 A. I don't remember him going in and out, no.

9 Q. Okay. If you could turn to page 8.

10 Based on that plea agreement -- this is a  
11 stipulated plea agreement; right? In other words, the  
12 defense and the prosecution had agreed upon certain  
13 representations that were made in this plea agreement?  
14 Once everybody had signed it.

15 A. What specifically --

16 Q. Okay. Well, actually let me start with -- let me  
17 start with -- let's go to page 2.

18 A. Okay.

19 MS. ROOHANI: Your Honor, and for the record,  
20 this hasn't been admitted, but I believe she's referring to  
21 docket entry number 146.

22 MS. CONNOLLY: I move to admit.

23 MS. ROOHANI: I have no objection to that. It's  
24 already in the record.

25 MS. CONNOLLY: Okay.

~~TRANSCRIBED FROM DIGITAL RECORDING~~

1 BY MS. CONNOLLY:

2 Q. The guilty plea indicated that Jan would be pleading  
3 guilty to Count 1, Possession of Child Pornography; Count  
4 2, Receipt of Child Pornography; Count 3, Distribution of  
5 Child Pornography; right?

6 A. Correct.

7 Q. Okay. And then if you turn to page 4, under a  
8 section titled, "Facts Supporting Guilty Plea," there's a  
9 whole bunch of facts; right?

10 A. Yes.

11 Q. Go through page 6.

12 And these are facts that the government and Jan  
13 were stipulating to; in other words, they're agreeing upon  
14 these are the facts that support this guilty plea; right?

15 A. Yes.

16 Q. Okay. And then I'll have you turn to page 7.

17 There's a number of calculations. There's a  
18 base offense level of 22 and then there's a number of  
19 enhancements; right?

20 A. Yes.

21 Q. And then on page 8, it indicates the adjusted  
22 offense level is a level 40.

23 A. Correct.

24 Q. Okay. Did you explain to -- do you remember,  
25 specifically recall telling Jan what a level 40 meant?

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1       A.       I don't have any specific recollection, but I'm sure  
2 I did.

3       Q.       Okay. Well, I don't want you to speculate if you  
4 don't recall then. You don't specifically -- do you  
5 remember if you had a guideline book with you? Did you sit  
6 down with him and go over the guideline book with him? Do  
7 you recall?

8       A.       I don't remember what I ate yesterday, Karen, sorry.

9       Q.       Okay.

10      A.       I don't specifically.

11      Q.       Okay. Fair enough.

12      A.       I can tell you that I -- whenever I'm going over a  
13 plea with a client --

14      Q.       Well, I don't want to talk about usually --

15      A.       Okay.

16      Q.       -- I just want to talk about if you remember in this  
17 specific --

18      A.       I don't have any specific recollection.

19      Q.       Okay. And you -- in most cases, it would be fair to  
20 say that you don't get presented with a guilty plea  
21 agreement -- or let me strike that.

22               In most cases the first time you go over a  
23 guilty plea agreement with a defendant is not usually in  
24 the anteroom right before they come in and enter a plea;  
25 right?

~~TRANSCRIBED FROM DIGITAL RECORDING~~

1 A. That's fair to say.

2 Q. In most cases we get guilty pleas and we get to go  
3 over them, we go back and forth with the government  
4 sometimes on enhancements and facts?

5 A. True.

6 Q. That never took place in this particular case?

7 A. No.

8 Q. The first time you got the guilty plea in your hands  
9 was about 10:00 that morning when it was e-mailed to you?

10 A. Sometime that morning, yes.

11 Q. And the first time that Jan ever saw the guilty plea  
12 agreement, you don't remember specifically if the marshals  
13 gave him a copy, but to the best of your recollection was  
14 that morning around about the same time as you have it?

15 A. Yes.

16 Q. Okay. Do you remember telling Jan or -- that he'd  
17 potentially get five years under this guilty plea  
18 agreement?

19 A. No, I don't remember specifically telling him that.

20 Q. Okay. So you could have? You just don't recall?

21 A. I would have told him the lowest he could get was  
22 five years.

23 Q. And, in fact, if you -- pursuant to the guilty plea  
24 agreement, two of the counts were going to be run together,  
25 and those two counts had a mandatory minimum of five years?

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1 A. Correct.

2 Q. All right. And a third count was a count which  
3 didn't have a mandatory minimum, but that count was going  
4 to run consecutive?

5 A. Correct.

6 Q. Does that refresh your recollection a little bit?

7 A. Yes.

8 Q. Okay. Could you please turn to the presentence  
9 report. There's a copy of it right in front of you. And  
10 turn to page 25.

11 MS. ROOHANI: And, again, Your Honor, this has  
12 not been admitted as evidence.

13 THE COURT: Well, she didn't move to admit it.  
14 I think, Aaron, would it be Exhibit G?

15 COURTROOM ADMINISTRATOR: G would be the next in  
16 line, Your Honor.

17 MS. CONNOLLY: I'd move to admit it. I know  
18 they're not normally public, but I would want to move, if I  
19 could, move to --

20 MS. ROOHANI: And, Your Honor I don't believe  
21 she's laid the proper foundation with this witness to admit  
22 this evidence.

23 THE COURT: All right. Well, let's -- all  
24 right. So the plea agreement, which is on the docket is  
25 number 146, is that the one that's admitted as Exhibit G,



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1 Aaron?

2 COURTROOM ADMINISTRATOR: Yes, Your Honor.

3 THE COURT: All right.

4 (Exhibit G received.)

5 MS. CONNOLLY: Okay.

6 BY MS. CONNOLLY:

7 Q. Now, if you look at -- please look at paragraph 48.

8 A. Okay.

9 Q. And it indicates the guideline for violation of 18  
10 U.S.C., Section 2252 is 22.

11 Fair to say that's -- that was the count that  
12 didn't have a mandatory minimum of five years?

13 A. I'm not sure.

14 Q. Okay. But there was -- the count that didn't have  
15 the mandatory minimum was going to run consecutive; right?

16 A. Correct.

17 Q. Are you aware that a level 22 under our sentencing  
18 guidelines with a criminal history category of I is 41 to  
19 51 months?

20 A. That sounds right.

21 Q. Okay. So you would agree that it was a 5-year  
22 mandatory minimum on the other two counts, and the minimum  
23 that he could receive, assuming that the base offense level  
24 is correctly calculated and the presentence investigation  
25 report level 22 with a guideline range of 41 to 51 months,

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1 the minimum he could receive would be 60 plus 41, 101  
2 months?

3 A. I don't agree with that.

4 MS. ROOHANI: Your Honor, and I'm also going to  
5 object based on leading. Ms. Connolly has been leading  
6 Mr. Durham from the very beginning. At this point I'm  
7 going to object on the nature and the way that she's asking  
8 these questions.

9 MS. CONNOLLY: Well, I can -- we can do it the  
10 sort of torturous route if we want, but --

11 THE COURT: All right.

12 MS. CONNOLLY: But I mean --

13 THE COURT: You're laying a foundation. You can  
14 lead until we get to the point you're trying to make,  
15 then --

16 BY MS. CONNOLLY:

17 Q. You're aware that in a guilty plea agreement I  
18 would -- did you -- let me ask you that.

19 Did you know, pursuant to this guilty plea  
20 agreement, there was two counts that were to run  
21 consecutive, one count to run -- two counts to run  
22 concurrent, one to run consecutive, did you know what the  
23 base offense level for that consecutive count was?

24 A. For the distribution count?

25 Q. Yes.

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1       A.       Well, I believe based on the plea agreement that a  
2 base offense level encompassed all three counts.

3       Q.       Okay. The two counts were run consecutive, the  
4 5-year mandatory minimums; right? So we know on those the  
5 minimum he can get is five years; right?

6       A.       Correct.

7       Q.       And then the third count was to run consecutive.  
8 What was the base offense level for that third count?

9       A.       I -- I don't know, off the top of my head.

10      Q.       So if you don't know, would it be fair to assume  
11 that you didn't advise Jan that morning of what the base  
12 offense level for that consecutive count was?

13      A.       I don't think that's fair to assume. I just don't  
14 have it in front of me. I mean --

15      Q.       So you don't -- well, let me ask you this.

16                You just got that plea agreement that morning  
17 and established that; right?

18      A.       Yes.

19      Q.       Okay. And do you -- do you have an independent  
20 recollection of getting the guilty plea before you came  
21 over to meet with Jan and going through your guideline book  
22 to determine what the base offense level was for the third  
23 consecutive count?

24      A.       I would have done that.

25      Q.       Do you recall doing that?

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1 A. I mean, not specifically.

2 Q. Okay. Please turn to the guilty plea agreement page  
3 6, paragraph 9, and read that to yourself, please.

4 A. Sorry, which paragraph?

5 Q. Paragraph 9. Page 6, paragraph 9.

6 A. Okay.

7 Q. Okay. Now, did you advise Jan that, given the facts  
8 set forth in that paragraph, that he was exposing himself  
9 to an obstruction of justice enhancement?

10 A. I don't remember.

11 Q. Okay. And direct your attention to paragraph 7. If  
12 you could please read that to yourself.

13 A. Okay.

14 Q. Did you advise Jan that pursuant to United States  
15 Sentencing Guideline 2G2.2 he was exposing himself to an  
16 additional five-point enhancement based upon that factual  
17 statement to which he stipulated?

18 A. I don't remember.

19 Q. And if you turn to page 7, do you see anywhere --  
20 this is the anticipated offense level calculation. It  
21 doesn't say anything in there about a two-level enhancement  
22 for obstruction of justice, does it?

23 A. No.

24 Q. And it doesn't have an enhancement in there for  
25 distributing child pornography in exchange for a thing of

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1 value, does it?

2 A. No.

3 Q. Okay. Are you aware that under the application of  
4 the United States Sentencing Guidelines that the Court must  
5 rely upon the factual stipulations in plea agreements in  
6 determining the appropriate guideline level on a particular  
7 case?

8 A. Would you repeat that? Sorry.

9 Q. Okay. Under the United States Sentencing Guidelines  
10 the Court, when it entertains a plea agreement, has to rely  
11 upon the factual admissions that are set forth in the plea  
12 agreement and use those to calculate the specific guideline  
13 range?

14 A. Yes, the Court has to have a factual basis --

15 Q. Okay.

16 A. -- yes.

17 Q. And you don't recall whether or not you advised Jan  
18 that under paragraph 7 and 9 on page 6 that he was facing  
19 additional enhancements that are not calculated on page 7  
20 of the plea agreement, did you?

21 A. I don't remember.

22 Q. Do you indicate that -- your testimony was that you  
23 believed you communicated the lowest that he could receive  
24 was five years?

25 A. Correct.

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1 Q. Okay. Are you aware that given the base offense  
2 level that's set forth in the plea agreement, the only way  
3 he could get to five years would be if the district court  
4 gave a significant variance of downward departure?

5 A. Yes.

6 Q. Okay. And given the best case scenario with a level  
7 40 with a range of 292 to 365, that's 24 years. In order  
8 for this particular judge to give him five years, she had  
9 to depart down on those 20 years. Yes?

10 A. Correct.

11 Q. Have you ever known of Judge Navarro to depart 20  
12 years in any particular case?

13 A. Not in any of my particular cases, no.

14 Q. Okay. Did you -- have you ever known Judge Navarro  
15 to depart 10 years in any particular case?

16 A. I couldn't tell you.

17 Q. So when you told Jan that the lowest he could  
18 receive is five years, you didn't even know if that was  
19 feasible in this particular case?

20 A. I told him what was -- under the guidelines, that  
21 that was the lowest that he could get, but that ultimately  
22 it's up to the judge.

23 Q. But you would agree in order for the judge to  
24 entertain five years, she would have to depart?

25 A. Of course.

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1 Q. Okay. Did you discuss departures with Jan?

2 A. Yes.

3 Q. Okay. And did you tell him that there was facts or  
4 circumstances in his particular case that would warrant a  
5 departure?

6 A. I believe I told him that he had circumstances that  
7 would help him get a variance.

8 Q. And what were those?

9 A. Just his history. I mean, he had done a lot of good  
10 in the community.

11 Q. And what do you mean "his history"?

12 A. He didn't have any criminal history as far as I  
13 know.

14 Q. Are you aware that most individuals that are charged  
15 with child pornography don't have criminal histories? Do  
16 you know whether they do or not?

17 A. I don't know that or not.

18 Q. Do you know whether the lack of criminal history has  
19 ever in the United States been a grounds for a departure or  
20 variance in a child pornography case?

21 A. I don't know.

22 Q. Okay. So besides the fact that he had no criminal  
23 history, was there anything else that you indicated to him  
24 that might warrant a variance or departure?

25 A. The fact that he had done a lot of good work in the

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1 community.

2 Q. Okay. Meaning?

3 A. Community service, volunteering.

4 Q. And do you know whether or not under where there's  
5 an abundance of case law there's any case law that says  
6 that being a good citizen should warrant a departure in a  
7 typical case, or a variance?

8 A. I mean, under the factors under 3553, she can look  
9 at his -- the nature and circumstances, his history, his  
10 family history, all those kind of things.

11 Q. Besides the 3553 factors, which the Court can  
12 consider the circumstances of the individual; right?

13 A. Correct.

14 Q. Okay. Do you know of any case law where in the  
15 Ninth Circuit there's been a variance or departure  
16 documented based upon good deeds of the individual in the  
17 community?

18 A. No, I couldn't tell you that.

19 Q. Were you also -- were you aware of how many images  
20 there were in the particular case?

21 A. I don't recall right now.

22 Q. Are you aware of -- are you aware that in the  
23 presentence investigation report indicates that the volume  
24 of pornographic images in this case was unprecedented?

25 A. I don't remember that.



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1 Q. Have you reviewed a copy of the presentence  
2 investigation report?

3 A. Not recently, no.

4 Q. But you did initially?

5 A. I did.

6 Q. And I apologize if I asked you this. I asked you if  
7 you had ever known Judge Navarro to do a 15-year departure  
8 or a 20-year departure in a child pornography case.

9 Do you know of any judge in this district ever  
10 doing that kind of a departure?

11 A. I don't know that.

12 MS. CONNOLLY: Court's indulgence.

13 Just a couple more questions.

14 BY MS. CONNOLLY:

15 Q. Do you remember how much time you got to spend with  
16 Jan that morning when you had the guilty plea agreement and  
17 were reviewing it with him?

18 A. I would be guessing.

19 Q. It wasn't a significant period of time; would that  
20 be fair to say?

21 A. Two or three hours if I had to -- if I had to guess.

22 Q. If you -- I can represent that that guilty plea  
23 agreement was sent over to Mr. Marchese approximately 9:58.  
24 The court recessed about noon.

25 A. Okay. So two hours.

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1 Q. Well, that would be if you got here right when the  
2 guilty plea was -- so two hours, less than two hours;  
3 right?

4 A. I wouldn't -- I couldn't tell you for sure.

5 Q. And that was the only discussion you ever had with  
6 him about plea agreements or guidelines or the sentencing,  
7 the federal sentencing structure; right?

8 A. As far as I remember.

9 MS. CONNOLLY: Thank you.

10 MS. ROOHANI: Are you done with him?

11 MS. CONNOLLY: Yes.

12 THE COURT: Ms. Roohani, cross?

13 CROSS-EXAMINATION

14 BY MS. ROOHANI:

15 Q. Mr. Durham, how are you?

16 A. Good.

17 Q. I'm going to start briefly with the affidavit that  
18 you had submitted to me.

19 Do you remember in that affidavit you indicated  
20 that Jan was only concerned about the Grindr chat facts  
21 that were in the plea agreement?

22 A. Sorry. That he was only concerned with what?

23 Q. With the facts regarding the Grindr chats that were  
24 in the plea agreement?

25 A. Yeah, he was concerned with some of those facts.

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1 Q. Okay. And did -- was part of the reason that he was  
2 concerned with those facts is because he understood that  
3 that led to a five-point enhancement for pattern of  
4 behavior?

5 MS. CONNOLLY: Objection. Calls for speculation  
6 as to what his understanding was.

7 BY MS. ROOHANI:

8 Q. Is that something that you explained to Jan?

9 A. Honestly, I couldn't tell you. I couldn't remember.

10 Q. Did you explain to him -- well, let me ask you this.

11 Did he ask for those facts to be removed from  
12 the plea agreement?

13 A. I believe he did.

14 Q. And did you, Mr. Sanft, or Mr. Marchese come and ask  
15 either me or Ms. Cartier-Giroux if we could remove those  
16 facts from the plea agreement?

17 A. I believe that -- yeah, I don't remember who did,  
18 but I believe we talked about that.

19 Q. And did either me or Ms. Cartier-Giroux indicate to  
20 whoever it was that those could not be removed?

21 MS. CONNOLLY: I'm going to object to -- he  
22 can't testify about what Ms. Cartier-Giroux or Ms. Roohani  
23 represented to some other person.

24 THE COURT: Sustained.

25

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1 BY MS. ROOHANI:

2 Q. After Jan had asked for those facts to be removed  
3 from the plea agreement, and the government indicated that  
4 they could not be removed because they supported --

5 MS. CONNOLLY: Objection. Assumes facts not in  
6 evidence.

7 THE COURT: Sustained.

8 BY MS. ROOHANI:

9 Q. Did someone communicate to you, whether it was  
10 Mr. Marchese or Mr. Sanft, that the government would not  
11 remove those facts from the plea agreement?

12 MS. CONNOLLY: Objection. Hearsay.

13 THE WITNESS: My recollection is actually  
14 that --

15 MS. CONNOLLY: Is there a -- objection.

16 THE COURT: He can testify as to his personal  
17 recollection without stating what other people said.

18 If you can answer the question that way, go  
19 ahead. But if not, then maybe we can rephrase it again.

20 THE WITNESS: Actually, my recollection was  
21 actually that I had spoken to you directly about those  
22 facts, and you said that you were not going to change any  
23 of the facts in the plea agreement.

24 BY MS. ROOHANI:

25 Q. And the reason that the government stated they

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1 weren't going to change those facts is because those facts  
2 supported a plus-five enhancement for the pattern of  
3 practice?

4 A. That was already in the plea agreement.

5 Q. Yes.

6 A. Yes.

7 Q. And you explained to Mr. Fuechtener that that was  
8 the reason why those facts could not be removed from the  
9 plea agreement?

10 A. Yes.

11 Q. So at some point Mr. Fuechtener, based upon what you  
12 explained to him, understood that facts in the plea  
13 agreement lined up with certain enhancements --

14 MS. CONNOLLY: Objection --

15 BY MS. ROOHANI:

16 Q. -- that were in the plea agreement?

17 MS. CONNOLLY: -- as to what he understood.  
18 Calls for speculation.

19 MS. ROOHANI: Your Honor, the way I asked it is  
20 based upon what he explained to Mr. Fuechtener.

21 THE COURT: If you're asking him what he  
22 explained --

23 MS. ROOHANI: Yes.

24 THE COURT: -- then that would be an appropriate  
25 form of the question.

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1 MS. ROOHANI: Okay.

2 BY MS. ROOHANI:

3 Q. And you explained to him that's why those facts  
4 could not be removed from the plea agreement?

5 A. Yes.

6 Q. Okay. You explained to him that facts in the plea  
7 agreement lined up with certain enhancements in the plea  
8 agreement?

9 A. Yes.

10 Q. And to explain that to him, you had to understand  
11 how some of the enhancements in the guideline book works?

12 A. Correct.

13 Q. Fair to say that's not the first time you've ever  
14 looked at the guideline book?

15 A. That's fair to say.

16 Q. Fair to say you've negotiated multiple plea  
17 agreements in the past on not just child pornography cases  
18 but other cases?

19 A. Yes.

20 Q. You understand how base offense levels work?

21 A. Yes.

22 Q. You understand how enhancements work?

23 A. Yes.

24 Q. You understand how grouping works?

25 A. Yes.

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1 Q. And you understand how concurrent and consecutive  
2 sentences work?

3 A. Yes.

4 Q. And you explained all that to Mr. Fuechtener?

5 A. Yes.

6 Q. Now, I want to go chronologically. Let's start with  
7 when Special Agent Panovich was in the middle of her  
8 testimony and we took a break.

9 Do you remember that?

10 A. Yes.

11 Q. Who approached the government to -- about a  
12 potential plea offer?

13 A. I think Mr. Marchese did.

14 Q. Would it be fair to say at that time you were  
15 sitting with Mr. Fuechtener?

16 A. Yes.

17 Q. Would it be fair to say at that point you probably  
18 had the best relationship and the ability to communicate  
19 with Mr. Fuechtener?

20 A. I don't know about that.

21 Q. Okay. And at some point did Mr. Marchese or Sanft  
22 ultimately come back and convey an offer?

23 MS. CONNOLLY: Objection. Hearsay.

24 MS. ROOHANI: I'm not asking about the terms of  
25 that --

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1 THE COURT: She's not asking the terms yet, just  
2 whether or not they came back --

3 MS. ROOHANI: Yes.

4 THE COURT: -- and --

5 THE WITNESS: Yes. Like a -- sort of a general,  
6 yeah, understanding of what an offer might be.

7 BY MS. ROOHANI:

8 Q. And what was your understanding, generally, about  
9 what that offer would be?

10 MS. CONNOLLY: Objection. Calls for hearsay.  
11 He wasn't privy to the conversation.

12 MS. ROOHANI: His understanding is not hearsay,  
13 Your Honor.

14 MS. CONNOLLY: Well, it would -- based on  
15 hearsay. His understanding is based on hearsay.

16 MS. ROOHANI: And, Your Honor, there are facts  
17 in evidence that both Mr. Marchese and Mr. Sanft all  
18 testified to this.

19 MS. CONNOLLY: It doesn't mean that it can come  
20 in through him.

21 THE COURT: Were they consistent with the plea  
22 agreement, the written plea agreement that you received the  
23 next morning?

24 THE WITNESS: Yes. They were -- I mean, they  
25 weren't given to me by the government, they were given to



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1 me by Mr. Marchese.

2 BY MS. ROOHANI:

3 Q. But they were consistent with the written plea  
4 agreement that you received the next morning?

5 A. Yes.

6 Q. There was nothing different from what was conveyed  
7 to Mr. Fuechtener by you on Wednesday than what was  
8 conveyed --

9 MS. CONNOLLY: Objection --

10 BY MS. ROOHANI:

11 Q. -- to him on --

12 MS. CONNOLLY: -- as to what was conveyed to  
13 Mr. Fuechtener. It's hearsay. He doesn't know what was  
14 conveyed to Mr. Fuechtener. He can only talk about what he  
15 conveyed.

16 MS. ROOHANI: Your Honor, if he conveyed it to  
17 Mr. Fuechtener, it's not hearsay.

18 MS. CONNOLLY: Well, then he didn't say he  
19 conveyed. You said what was conveyed to him, without  
20 designating by whom.

21 BY MS. ROOHANI:

22 Q. Did you convey to Mr. Fuechtener the terms of the  
23 plea agreement on Wednesday?

24 A. Before we had the written plea?

25 Q. Yes.

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1 A. Yes, I would have conveyed to him the -- just the  
2 general terms.

3 Q. And did you convey those same terms to him on  
4 Thursday?

5 A. Yes.

6 Q. Now, when you received the plea agreement, did you  
7 go over the plea agreement before you came over here to the  
8 federal courthouse?

9 A. Yes. It was e-mailed to me, so --

10 Q. Did you have your guideline book with you?

11 A. Yes.

12 Q. Did you meet with Jan at the marshals lockup on the  
13 second floor?

14 A. Yes.

15 Q. Did you discuss with him the terms of the plea  
16 agreement?

17 A. Yes.

18 Q. Did you attempt to go through, and I understand it's  
19 difficult, but attempt to go through the plea agreement  
20 with him line by line?

21 A. Yes.

22 Q. And eventually was Jan brought up to the courtroom  
23 by the marshals?

24 A. Yes.

25 Q. And did you meet him up here?

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1 A. Yes.

2 Q. And when you met him up here, did you, in fact, go  
3 through the plea agreement with Jan line by line?

4 A. A second time?

5 Q. To the extent that eventually the entire plea  
6 agreement was covered with him line by line.

7 A. Yes.

8 Q. Okay. And you were the person to do that?

9 A. Yes.

10 Q. And you had the guideline book with you?

11 A. I can't tell you that I did for sure, but I would be  
12 very surprised if I didn't.

13 Q. Okay. Fair to say that you don't specifically  
14 remember what color the cover of the guideline book was,  
15 but it's something in your normal practice you would have  
16 done?

17 A. Yes.

18 Q. Did you have a copy of the sentencing table in the  
19 back of the book with you?

20 A. Yes.

21 Q. Okay. Did you have that either in electronic form  
22 or in paper form with you?

23 A. Yes.

24 Q. Did you show that to Jan?

25 A. Yes.

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1 Q. Did you show him that a criminal -- that a, sorry,  
2 an offense level of 40 with a criminal history I  
3 corresponded with 292 to 365 months?

4 A. I would have -- yes, I would have showed him that.

5 MS. CONNOLLY: Objection. If he -- he said "I  
6 would think so," speculation. He said he doesn't -- he  
7 didn't recall if he went over the guideline table with him.  
8 He didn't recall if he had the book with him.

9 MS. ROOHANI: Your Honor, he just testified that  
10 he did, in fact, have the table with him.

11 MS. CONNOLLY: He's speculating. He said he  
12 didn't know.

13 THE COURT: He said he didn't recall if he had  
14 the book, but he did recall that he had the table.

15 BY MS. ROOHANI:

16 Q. And so did you show Mr. Fuechtener a copy of this  
17 table? I believe you testified yes?

18 A. The sentencing table?

19 Q. Yes.

20 A. Yes.

21 Q. And did you show him that an offense level 40,  
22 criminal history category I, going down on the table and  
23 then across, was 292 to 365 months?

24 A. Under criminal history I.

25 Q. Yes.

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1 A. Yes.

2 Q. And did he see it?

3 A. Yes.

4 Q. Did he acknowledge that he saw it?

5 A. Yes.

6 Q. Did he ask you any questions about that number?

7 A. I couldn't recall that.

8 Q. But he asked you questions about the Grindr chats?

9 A. I do remember that.

10 Q. And you explained to him that those facts needed to  
11 stay in the plea?

12 A. I did after I had tried to get them removed, yes.

13 Q. Okay. And you indicated to him that those lined up  
14 with the guidelines that are in the plea agreement?

15 A. Correct.

16 Q. And those guidelines when you count them up match up  
17 to the 40?

18 A. Correct.

19 Q. And you believed his criminal history category to be  
20 I?

21 A. Yes.

22 Q. So you explained to him that the true sentencing  
23 exposure that he was --

24 MS. CONNOLLY: I'm going to object to the  
25 prosecutor essentially testifying. I know it's

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1 cross-examination, but this is not a usual, you know,  
2 cross-examination situation. Every question has been her  
3 testifying so far.

4 THE COURT: He can answer yes or no to her  
5 representations. It's fine. Overruled.

6 BY MS. ROOHANI:

7 Q. So you explained to him that his exposure was 292 to  
8 365 months under the terms of the plea agreement?

9 A. Yes.

10 Q. Okay. Now, another part of that plea agreement also  
11 talks about relevant conduct; correct?

12 A. Correct.

13 Q. And that's pretty standard language in plea  
14 agreements that you've reviewed in the past?

15 A. Correct.

16 Q. You understand how relevant conduct works?

17 A. Yes.

18 Q. And that's something that the Court can always  
19 consider?

20 A. Correct.

21 Q. In fact, it's statutorily mandated that the Court  
22 can consider all facts about the defendant under 3661; is  
23 that correct?

24 A. Correct.

25 Q. So in terms of the relevant conduct, because you

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1 have gone through this plea agreement with Mr. Fuechtener  
2 line by line, you explained relevant conduct to him?

3 A. Correct.

4 Q. You explained to him that the judge can consider  
5 facts from the evidence?

6 A. Correct.

7 Q. And, in fact, at that point Judge Navarro had heard  
8 the majority of the facts --

9 A. She had.

10 Q. -- of this case?

11 A. Yes.

12 Q. And you're familiar with how plea agreements work in  
13 terms of enhancements that perhaps the parties don't agree  
14 to?

15 A. Yes.

16 Q. And you're familiar that if the parties didn't agree  
17 to an obstruction of justice enhancement and probation  
18 applied it, you could object, and under Ninth Circuit law  
19 the judge couldn't apply that?

20 A. Correct.

21 Q. And that was your understanding?

22 A. Yes.

23 Q. And have you in the past objected to enhancements  
24 that have been in plea agreements that the parties didn't  
25 agree to?

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1 A. Yes.

2 Q. And, in fact, in those cases did the judge not apply  
3 those enhancements?

4 A. Correct.

5 Q. And you have a case that you cite?

6 A. Off the top of my head?

7 Q. No. But just generally?

8 A. Yeah.

9 Q. And you've cited it before?

10 A. Yes.

11 Q. And, in fact, under the terms of the plea agreement,  
12 if the government had sought an obstruction of justice  
13 enhancement, the government would be breaching the plea  
14 agreement?

15 A. That's correct.

16 Q. And in any event, the Court had already heard the  
17 evidence, so it was coming in under relevant conduct?

18 A. Correct.

19 Q. Let's talk a little bit about when Mr. Fuechtener  
20 wanted to withdraw his guilty plea.

21 Did he talk to you on the phone or in person  
22 about that?

23 A. I talked to him on a video monitor across the  
24 street, and I also met with him in Pahrump in person.

25 Q. And was that shortly after he had received the PSR



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1 in this case?

2 A. I don't remember.

3 Q. Did he -- in fact, had he received the PSR, even if  
4 it wasn't shortly in time --

5 MS. CONNOLLY: I'm sorry, I didn't hear the  
6 question.

7 BY MS. ROOHANI:

8 Q. Was it -- had he received the PSR at that point?

9 MS. CONNOLLY: I'm going to object. It assumes  
10 facts not in evidence. He said he didn't know if he had  
11 the PSR.

12 MS. ROOHANI: That's why I'm asking the  
13 question, if he had the PSR.

14 THE COURT: Overruled. He can answer that  
15 question.

16 THE WITNESS: I remember meeting with Jan across  
17 the street, through the probation video, with Jess. But I  
18 don't know for sure if he had the PSR at that point.

19 And when I met with him in Pahrump, I think that  
20 he had the PSR, but I -- I'm not a hundred percent sure.

21 BY MS. ROOHANI:

22 Q. Did you think he had a PSR because he stated to you  
23 that he wanted to withdraw his plea based upon the  
24 recommendation in the PSR?

25 A. In Pahrump?

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1 Q. At any point that you met with him?

2 A. Oh, I'm -- I would be speculating. But I'm sure  
3 that came in to --

4 Q. Did he indicate to you that he did want to withdraw  
5 his guilty plea at some point?

6 A. He did.

7 Q. Did he say it was because he didn't understand what  
8 he was facing?

9 A. I don't recall that.

10 MS. ROOHANI: Brief indulgence, Your Honor.

11 Your Honor, I'll pass the witness.

12 THE COURT: Ms. Connolly?

13 REDIRECT EXAMINATION

14 BY MS. CONNOLLY:

15 Q. You didn't explain to Jan there was a potential  
16 seven additional points that could get base -- that could  
17 get added to his base offense level based upon the  
18 stipulated facts set forth in the plea agreement, did you?

19 MS. ROOHANI: Your Honor, I'm sorry. I didn't  
20 hear the beginning of that. I'm sorry.

21 BY MS. CONNOLLY:

22 Q. You did not explain to Jan that there could be an  
23 additional seven points added to his base offense level  
24 based upon facts stipulated to in the plea agreement, did  
25 you?

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1 A. I don't remember that.

2 Q. Okay. And you indicated that you have never --  
3 again, to clarify, you have never done a guilty plea  
4 agreement in a child pornography case before?

5 A. I don't --

6 Q. In federal court --

7 A. That I --

8 MS. ROOHANI: I believe that misstates his  
9 testimony.

10 BY MS. CONNOLLY:

11 Q. Have you ever done a guilty plea agreement in a  
12 child pornography case?

13 A. I don't recall.

14 Q. Okay. In a child pornography case it's not like a  
15 run-of-the-mill drug case where you -- you have on a  
16 regular basis; right?

17 A. Yeah, they're not --

18 Q. Fair to --

19 A. -- common.

20 Q. -- say with a drug case or a gun case you're  
21 familiar with the kind of enhancements that are going to  
22 apply; right?

23 A. Yeah. For the most part.

24 Q. You can get a couple points or you can get points  
25 for a leader/organizer, or you can get points for a gun

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1 being used. You're familiar with -- more familiar with  
2 those guidelines than child pornography guidelines and  
3 enhancements; right?

4 A. I see them more often.

5 Q. And, again, you don't have independent recollection  
6 of -- prior to this case, having reviewed the -- all  
7 potential enhancements in a child pornography case? Well,  
8 you couldn't. You didn't review the images, did you?

9 MS. ROOHANI: Misstates his testimony.

10 THE WITNESS: Could you repeat the question?

11 BY MS. CONNOLLY:

12 Q. Okay. You didn't review all the images in this  
13 case, did you?

14 A. No.

15 Q. You reviewed some?

16 A. Right.

17 Q. Okay. And you weren't aware of all the applicable  
18 enhancements that could apply under the facts of this  
19 guilty plea?

20 A. I mean, there could have been a bunch of other ones,  
21 I'm sure.

22 Q. And you weren't aware of those because this was the  
23 first time you'd ever done a child pornography case, and  
24 you just got the guilty plea the morning the plea was  
25 entered; right?

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1       A.       I mean, we stipulated to the offense  
2 characteristics, so --

3       Q.       Okay. But you didn't advise Jan that although there  
4 was certain enhancements that had been stipulated to, there  
5 could be additional ones that apply?

6       A.       I don't recall specifically.

7       Q.       Okay. And, again, to clarify, you told -- you told  
8 me today and previously that you don't specifically recall  
9 if you had a United States Sentencing Guideline book with  
10 you that morning when you came over and met with him in  
11 regard to the guilty plea agreement, do you?

12      A.       Right.

13      Q.       So when you say, "Yes, I believe I did go over  
14 them," that's based upon your usual practice?

15      A.       Yes.

16      Q.       And you indicated that you thought that when you got  
17 the guilty plea that you reviewed the guidelines in your  
18 office before you came over?

19      A.       Yes.

20      Q.       Okay. Well, if you didn't get the guilty plea  
21 agreement until 10:00 and court resumed at 2:00, that would  
22 have cut in -- that means that you met with Jan for less  
23 than two hours because you had to spend some time in your  
24 office going over the guidelines; right?

25      A.       Fair.

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1 Q. So when you say that you recall going over the  
2 table, is that what you know you did, or you're speculating  
3 that you did that because that's your common practice to  
4 do?

5 A. I remember going over the table.

6 Q. You had the table. In what format do you have the  
7 table -- did you have the table? Do you recall?

8 A. I have the table inside my guideline book.

9 Q. But you don't recall if you had the guideline book  
10 with you or not?

11 A. No, I don't.

12 MS. CONNOLLY: Thank you.

13 MS. ROOHANI: Briefly, Your Honor?

14 THE COURT: Yes.

15 RECROSS-EXAMINATION

16 BY MS. ROOHANI:

17 Q. Mr. Durham, did you have your iPad with you during  
18 trial, or some sort of tablet with you?

19 A. I believe so.

20 Q. Did you have the capacity to look up the guideline  
21 table on that?

22 A. Yes.

23 Q. Is it possible that that's what you looked at?

24 A. Possible.

25 Q. I want you to look at page 7 of that plea agreement

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1 that's in front of you, document 146 on the docket. I  
2 believe it sets forth the enhancements.

3 You answered some questions about Ms. -- with  
4 Ms. Connolly about those enhancements. I want to go  
5 through them one by one.

6 In terms of material depicted prepubescent  
7 minor, what do you believe that enhancement to encompass?

8 A. It's pretty self-explanatory.

9 Q. That enhancement is self-explanatory; fair?

10 A. Yes.

11 Q. Okay. What about knowing distribution? What do you  
12 think that encompasses?

13 A. Allowing others to view the images or to share the  
14 images with other people.

15 Q. And you did it knowingly. Again, self-explanatory.  
16 Fair to say?

17 A. Yeah. Yeah.

18 Q. What about sadistic or masochistic conduct? What do  
19 you think that would encompass?

20 A. That's self-explanatory as well.

21 Q. Something about the images being sadistic or  
22 masochistic?

23 A. Right.

24 Q. In terms of pattern of activity, I believe we've  
25 already talked about this one, in terms of the Grindr chat.

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1 Is that what you understood it to mean?

2 A. Yes.

3 Q. In terms of use of a computer, what did you believe  
4 that to mean?

5 A. Self-explanatory.

6 Q. And in terms of 600-plus images, what did you  
7 believe that to mean?

8 A. That he -- that they found more than 600 images.

9 Q. Would it be fair to say that at that point Special  
10 Agent Panovich had already testified that over 2,000 images  
11 had been found on the three devices of the seven that we  
12 had gone through?

13 A. It's fair to say.

14 Q. Okay. So in terms of understanding the guidelines,  
15 you would agree with me that these are self-explanatory  
16 guidelines for the most part?

17 A. Yes.

18 Q. So you didn't necessarily need to review in detail  
19 your sentencing guideline book to explain these  
20 enhancements to Mr. Fuechtener?

21 A. No.

22 Q. Okay.

23 MS. ROOHANI: Pass the witness, Your Honor.

24 THE COURT: Ms. Connolly?

25 MS. CONNOLLY: I don't have anything further.



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1 THE COURT: Mr. Durham, looking at page 6,  
2 paragraph 7 --

3 THE WITNESS: Of the plea agreement?

4 THE COURT: Yes. I think it's document 146  
5 which has been admitted as Exhibit G.

6 THE WITNESS: Uh-huh.

7 THE COURT: In that paragraph 7 did you ever  
8 question why those facts are provided in the plea  
9 agreement?

10 THE WITNESS: Did I ever question them?

11 THE COURT: Yes. Did it ever occur to you, Why  
12 are these facts in the plea agreement? Are they related to  
13 something -- some special enhancement or some other element  
14 of the offense?

15 THE WITNESS: I don't recall today. But I'm  
16 sure I looked at it when I received the plea agreement. I  
17 don't remember if that was one of the -- one of the  
18 paragraphs that we tried to get removed or not.

19 THE COURT: What about paragraph 9?

20 THE WITNESS: I think we also -- if I recall, I  
21 think we also mentioned that one to the government. But I  
22 don't remember specifically.

23 THE COURT: All right. Ms. --

24 MS. ROOHANI: Can I ask --

25 THE COURT: It's actually Ms. Connolly's

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1 witness.

2 Ms. Connolly, did you have any follow-up?

3 MS. CONNOLLY: No.

4 THE COURT: All right. Ms. Roohani --

5 MS. ROOHANI: I have two brief follow-ups.

6 FOLLOW-UP EXAMINATION

7 BY MS. ROOHANI:

8 Q. Let's talk about first about paragraph 7. It's  
9 talking about the distribution of child pornography.

10 Were you present for the plea colloquy?

11 A. Yes.

12 Q. Do you remember at some point Judge Navarro asked  
13 Mr. Fuechtener, "Did you offer to distribute child  
14 pornography by sharing your Gigatribe lars45 folder?"

15 A. I don't remember that specifically, but --

16 Q. If I represented to you that that was from the  
17 transcript of the proceedings --

18 A. Yes.

19 Q. Okay. And in terms of the pattern and practice  
20 enhancement -- I'm sorry. Let me back up.

21 In terms of the distribution enhancement, could  
22 this fact be used to support a knowing distribution?

23 A. Yes.

24 Q. Okay. In terms of the pattern or practice, could  
25 this be one of the two patterns of behavior that's required

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1 to support that enhancement?

2 A. Yes.

3 Q. And by itself, would the Grindr chat support that  
4 enhancement?

5 A. The pattern?

6 Q. Yes. By itself, would the Grindr chats support it?

7 A. I don't believe so, no.

8 Q. So this paragraph 7 would be required to support  
9 that plus-five enhancement?

10 MS. CONNOLLY: I'm objecting to the prosecutor  
11 essentially giving him the answers to the question when  
12 she's asking him.

13 THE COURT: Yes. Just rephrase it. Is it your  
14 understanding then that's why --

15 BY MS. ROOHANI:

16 Q. Is that your understanding?

17 A. Yes.

18 Q. Let's talk about paragraph 9.

19 In terms of paragraph 9, in that unspecified  
20 account, would the government, in your estimation, be able  
21 to apply an obstruction of justice enhancement if it was  
22 not related to this case?

23 MS. CONNOLLY: Objection. Assumes facts not in  
24 evidence.

25 THE COURT: Repeat the question. I'm not sure I

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1 understood it.

2 BY MS. ROOHANI:

3 Q. On paragraph 9, it specifically talks about  
4 Mr. Fuechtener asking his husband to delete evidence,  
5 quote, on an unspecified account. Do you see that?

6 A. Yes.

7 Q. Did the government ever establish what that  
8 unspecified account was?

9 A. I don't think so.

10 Q. Okay. And so for an obstruction of justice  
11 enhancement to apply, based upon your experience as a  
12 criminal defense attorney and practicing in this court,  
13 would the government have to link that to something related  
14 to this case?

15 A. That's my understanding.

16 Q. Okay. So if the government couldn't link that or  
17 produce additional evidence to show that that unspecified  
18 account was related to this case, was it your understanding  
19 that the Court could not apply that enhancement?

20 MS. CONNOLLY: Judge, I -- objection. It's  
21 misstating the law.

22 MS. ROOHANI: I don't believe it's misstating  
23 the law, Your Honor, and I believe it's also --

24 THE COURT: Are you asking him what he thought  
25 at the time --

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1 MS. ROOHANI: Yes.

2 THE COURT: -- or what he thinks now?

3 BY MS. ROOHANI:

4 Q. What you thought at the time? Or now? I guess  
5 let's start with what you thought at the time.

6 A. At that time I didn't believe it supported the  
7 obstruction enhancement.

8 Q. Okay. And now do you believe it supports the  
9 obstruction enhancement?

10 A. No.

11 Q. Okay.

12 MS. ROOHANI: I hope that clarifies, Your Honor.

13 THE COURT: Then what was the purpose of  
14 paragraph 9, the facts in paragraph 9? Why was that  
15 included?

16 MS. ROOHANI: Are you asking me, or are you  
17 asking Mr. Durham, Your Honor?

18 THE COURT: Mr. Durham.

19 MS. ROOHANI: Okay.

20 THE WITNESS: I don't remember, Your Honor.

21 THE COURT: And going back to paragraph 7, the  
22 Skype paragraph that Ms. Roohani was describing for the  
23 distribution enhancement, because it states that the  
24 defendant shared his Gigatribe folder, was it necessary to  
25 include an exchange for a thing of value for it to be

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1 distribution?

2 THE WITNESS: I don't believe --

3 THE COURT: Was it your understanding you  
4 need -- distribution requires an exchange for a thing of  
5 value, or could it be just distribution if you're sharing  
6 the Gigatribe folder?

7 THE WITNESS: I couldn't tell you the answer to  
8 that.

9 THE COURT: All right.

10 MS. ROOHANI: Your Honor, could I follow up on  
11 that?

12 THE COURT: Sure.

13 FOLLOW-UP EXAMINATION

14 BY MS. ROOHANI:

15 Q. Would having a conversation and agreeing to  
16 exchange something for a thing of value show the knowing  
17 aspect of the distribution?

18 A. Sure.

19 Q. And, in fact, under 2G2.2, the government -- or the  
20 Court would not be able to apply an enhancement unless  
21 there was a knowing aspect to it; correct?

22 A. That's correct.

23 Q. So, in fact, if the file was shared by itself and  
24 didn't include that specific language, potentially there  
25 would not be specific facts to support a knowing

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1 distribution. Would that be fair to say?

2 A. That's correct.

3 MS. CONNOLLY: May I follow up?

4 THE COURT: Yes.

5 FOLLOW-UP EXAMINATION

6 BY MS. CONNOLLY:

7 Q. Under 2G2.2(b)(3)(B), the enhancement is that it's  
8 distribution in exchange for valuable consideration;  
9 correct? That's a separate enhancement when it's  
10 distribution for something in return, for consideration.

11 For your reference, you can go to paragraph --  
12 page 25, paragraph 50 of the PSR.

13 A. Are you saying that that's different than the  
14 distribution?

15 Q. Well, for distribution you don't have to have  
16 valuable consideration; right? You can distribute  
17 something without getting value for consideration in  
18 exchange for that; right?

19 A. Right.

20 Q. In fact, the pattern of activity means those kind of  
21 distribution of the pornography; right?

22 A. Right.

23 Q. And that enhancement was anticipated in the plea  
24 agreement. In fact, there was an enhancement set forth in  
25 the plea agreement for pattern of activity which involved

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1 distribution; right?

2 A. Right.

3 Q. And this particular enhancement set forth in  
4 paragraph 50, page 25 of the PSR involves specifically in  
5 exchange for valuable consideration.

6 A. So you're saying that's a different enhancement?

7 Q. Yes. Would you agree with that?

8 A. I will take your word for it.

9 MS. CONNOLLY: Thank you.

10 FURTHER FOLLOW-UP EXAMINATION

11 BY MS. ROOHANI:

12 Q. And, again, Mr. Durham, just to be clear, if the  
13 parties didn't agree to that enhancement, it was your  
14 understanding that the Court couldn't apply that  
15 enhancement. Would that be fair to say?

16 A. Correct.

17 MS. CONNOLLY: Did you say you are aware the  
18 Court could apply that enhancement?

19 MS. ROOHANI: He believed that they would not be  
20 able to apply that enhancement.

21 THE WITNESS: Correct.

22 FURTHER FOLLOW-UP EXAMINATION

23 BY MS. CONNOLLY:

24 Q. Because I asked you previously if you were aware of  
25 application note 1B where it indicates that the Court has



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1 to look at stipulated facts in the plea agreement and apply  
2 the applicable guidelines. Are you aware of that?

3 A. Yes, but --

4 Q. In other words, the Court just can't ignore facts  
5 that have been stipulated to by the government and the  
6 defense, can it?

7 A. No.

8 MS. CONNOLLY: Thank you.

9 FURTHER FOLLOW-UP EXAMINATION

10 BY MS. ROOHANI:

11 Q. You said, "Yes, but." Can you please finish your  
12 answer.

13 A. I think it's two different things that we're talking  
14 about.

15 Q. Okay. Can you explain?

16 A. I mean, there has to be a factual basis for the  
17 Court to accept the plea. But then for the Court to imply  
18 the different enhancements under the guidelines is to me a  
19 different -- talking about sort of a different thing.

20 Q. Okay. So --

21 A. So if we stipulated, in my experience, to the  
22 particular guidelines and the enhancements and then  
23 probation comes in and recommends additional enhancements,  
24 the government can't -- is bound by the enhancements that  
25 were negotiated, and under whatever that case law is you

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1 came in here and argued for those enhancements, you would  
2 be violating the plea agreement.

3 Obviously the judge can impose whatever  
4 enhancements she deems appropriate under the law. But in  
5 my experience, I've never had a judge do that when the  
6 parties have stipulated to those enhancements.

7 Q. And, in fact, you've seen the reverse happen. Would  
8 that be fair to say?

9 You and I recently worked on a case, Jazzmin  
10 Dailey, and the parties had agreed to a specific  
11 enhancement that probation didn't apply?

12 A. Correct.

13 Q. And at that point we asked the Court to consider the  
14 facts in the plea agreement and explained why those facts  
15 met a specific enhancement?

16 A. True.

17 Q. And in your estimation, has the reverse happened,  
18 there might be facts in the plea agreement, or certain  
19 things that probation is applying, that the Court  
20 ultimately doesn't apply because the parties did not agree  
21 to that?

22 A. Correct.

23 Q. Okay. Thank you.

24

25

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1                                   FURTHER FOLLOW-UP EXAMINATION

2       BY MS. CONNOLLY:

3           Q.       And those cases, those involve cases where you and  
4       the government have specifically stipulated to certain  
5       facts? There's cases where parole and probation will come  
6       in and say, Oh, I read in the police report that the  
7       defendant did X, Y, and Z, and based upon what's in the  
8       police report there should be an enhancement; right?

9           A.       Yes.

10          Q.       And so you come to court and parole and probation  
11       argues for that, and the government says, "We're not going  
12       to request that, we're not presenting any evidence that the  
13       enhancement applies," and then the Court doesn't apply it;  
14       right?

15          A.       Right.

16          Q.       You'd agree that's different to a case, such as the  
17       one here, where based upon the stipulated facts, facts that  
18       have been agreed upon by the defendant and the government,  
19       that's different from parole and probation just looking at  
20       a hearsay police report and suggesting to the Court that  
21       enhancement applies? You would agree those are two  
22       entirely different situations; right?

23          A.       I'm not sure I understand.

24          Q.       Okay.

25          A.       I'm sorry.

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1 Q. In some cases parole and probation will come in, and  
2 they get the police reports, and they'll suggest a  
3 two-point enhancement based upon information they've read  
4 outside of the plea agreement?

5 A. Okay.

6 Q. Right?

7 A. Right.

8 Q. We come across those cases?

9 A. Yes.

10 Q. And the government would stand up and say, "We're  
11 not requesting that enhancement, Judge"?

12 A. Right.

13 Q. And in order for the Court to give that enhancement,  
14 the government has to present some facts --

15 A. Right.

16 Q. -- to support the enhancement; right?

17 A. Right.

18 Q. Okay. And in those particular cases, there weren't  
19 facts set forth in the guilty plea agreement that supported  
20 the enhancements, were there?

21 A. No. Generally, the facts will support whatever  
22 enhancements are in the plea agreement.

23 Q. So I'm talking -- so in this particular case, based  
24 on specific facts that were stipulated to, there's certain  
25 enhancements that apply under the United States Sentencing

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1 Guidelines that were not included in this plea agreement;  
2 right?

3 A. That's what it sounds like.

4 Q. Okay.

5 MS. CONNOLLY: I don't have anything else.

6 MS. ROOHANI: Your Honor, I'm going to reserve  
7 the rest for argument. I don't think that Mr. Durham will  
8 have specific knowledge to what I would like to argue to  
9 Your Honor.

10 MS. CONNOLLY: I'm sorry. I didn't hear what  
11 you said.

12 MS. ROOHANI: I'm going to save the rest for  
13 argument.

14 MS. CONNOLLY: Okay.

15 THE COURT: All right. So, Mr. Durham, as you  
16 sit here today, you don't recall what the purpose was of  
17 that paragraph 9 being included in the plea agreement?

18 THE WITNESS: I don't have any independent  
19 recollection, no.

20 THE COURT: And there was no enhancement for  
21 obstruction that was contemplated in the plea agreement?

22 THE WITNESS: Correct.

23 THE COURT: All right. Nothing -- anything  
24 else?

25 MS. ROOHANI: Not from the government.

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1 THE COURT: All right. Thank you for coming in,  
2 Mr. Durham. You're excused.

3 (The witness was excused.)

4 MS. CONNOLLY: Jan Rouven Fuechtener.

5 THE COURT: Did you have any other witnesses,  
6 Ms. Connolly?

7 MS. CONNOLLY: Excuse me? He was talking to me.  
8 I didn't hear you.

9 THE COURT: Did you have any other witnesses to  
10 call?

11 MS. CONNOLLY: Yes, Jan Rouven Fuechtener. I'm  
12 going to have --

13 MS. ROOHANI: Do we want to deal with the  
14 Humphries' situation now?

15 MS. CARTIER-GIROUX: I'm sorry?

16 MS. ROOHANI: I don't know that we're going to  
17 finish with Jan. Do you want to (inaudible).

18 MS. CONNOLLY: You want to call him --

19 MS. ROOHANI: I'm not. Are you going to call  
20 him?

21 MS. CONNOLLY: I'm going to put him on after  
22 him.

23 MS. ROOHANI: Do you want to just deal with the  
24 situation as to whether he's going to testify?

25 MS. CONNOLLY: Sure.

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1 MS. ROOHANI: Your Honor, we -- it's my  
2 understanding that Ms. Connolly, after she calls  
3 Mr. Fuechtener, is also going to call Bret Humphries, who  
4 Your Honor submitted the writ for testificandum on him.

5 We have something that has been brought to our  
6 attention by Dustin Marcello, who you appointed for  
7 Mr. Humphries. And I believe Mr. Marcello is here, and he  
8 can speak to it a little bit further.

9 But my understanding is that Mr. Humphries says  
10 that he will only answer questions about this case, he will  
11 not answer any questions about his case whatsoever, but I  
12 have a good faith basis upon which to ask him questions  
13 that go to his -- go to bias regarding the facts of his  
14 case.

15 And so I'd like to do that outside of the public  
16 hearing. I don't know if you'd like to hear that at  
17 sidebar. But I do believe I have a good faith basis to ask  
18 him questions about his case and certain statements that  
19 he's made to Mr. Fuechtener while in custody that will  
20 certainly reflect on his bias.

21 And in the event that he will refuse to answer  
22 those questions, I believe it's either appropriate for Your  
23 Honor to refuse to allow him to testify, or, alternatively,  
24 if he is going to testify and then not answer those  
25 questions, to strike his testimony.

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1 I'm just trying to sort of head this off rather  
2 than having to hear all the testimony and then move to  
3 strike it.

4 So I don't know if Your Honor wants to deal with  
5 that now. I know Mr. Marcello is here. He's billing for  
6 it. I figured we should deal with this now before we get  
7 to that point.

8 THE COURT: So what are the questions that you  
9 intend to ask that are about his case? He's not been to  
10 trial yet or pled guilty; right?

11 MS. ROOHANI: No. And his trial is scheduled  
12 coming up within the next month.

13 Specifically, Your Honor, I believe that  
14 Mr. Humphries has made certain admissions regarding his  
15 guilt to Mr. Fuechtener while in custody, and I believe  
16 that his testimony is in the hope that Mr. Fuechtener will  
17 not come and speak with the government regarding those  
18 admissions.

19 And I believe that I have the right to probe on  
20 that issue to see what admissions he's potentially made to  
21 Mr. Fuechtener and any type of consideration that  
22 Mr. Fuechtener may have given him for his testimony.

23 THE COURT: And so, Mr. Marcello, do you mind  
24 coming up and letting us know if you were aware whether  
25 there is an issue that's going to be coming up here.



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1           MR. MARCELLO: And, Your Honor, what the issue  
2 should be is I've spoken to Mr. Humphries. Without getting  
3 into the substance of our discussions, essentially he is  
4 going to take the position that he will only testify as to  
5 this case, what he has to testify as to this case, and  
6 anything related to his case he is going to refuse -- or  
7 has indicated to me he would refuse to answer, either  
8 related to his case -- there was two things.

9           One, there was they had some type of motion that  
10 involved an informant in that hearing. Ultimately, I  
11 believe the Court ruled in his favor. Anything related to  
12 that motion or the circumstances that gave rise to that  
13 motion, he would refuse to answer; anything to do with his  
14 underlying charges that he's going to trial on, he would  
15 refuse to answer; but otherwise would testify to -- and be  
16 subject to cross-examination as to any facts or  
17 circumstances related to his testimony in this case and  
18 this case only.

19           THE COURT: Okay. Well, I agree that he has a  
20 right to not answer any questions that are specifically  
21 about his case.

22           If he is asked questions that are broader, such  
23 as, "Did you discuss your case with Mr. Fuechtener?" "How  
24 many times did you discuss your case with Mr. Fuechtener?"  
25 How long were those discussions?" or something like that,

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1 would that, in your opinion, would that still be violating  
2 his right to remain silent and not incriminate himself?

3 MR. MARCELLO: Well, that--

4 THE COURT: See, the issue is the government is  
5 trying to elicit facts to demonstrate bias. I don't know  
6 that we need to really get into details, but just whether  
7 or not they've had discussions in general about each  
8 other's cases.

9 MR. MARCELLO: Again, I don't know the extent to  
10 how far he's going to be willing to answer questions as to  
11 those. I'm just relaying what he indicated to me, that if  
12 asked those questions about his case, that he would refuse  
13 to answer them.

14 I think generic, general questions like that,  
15 probably he would say, but I wouldn't know until he's up  
16 here.

17 He had just indicated to me that he would --  
18 again, this is why the government wanted to bring it to  
19 your attention, to see whether he would be stricken or  
20 limited or whatever's going to happen.

21 But basically anything related to that motion,  
22 the granting of that motion, and his case he has indicated  
23 that he wouldn't testify to.

24 How far until we get to that point, I don't know  
25 until he starts getting asked the questions and either

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1 wants to consult with me or not or refuses to answer them,  
2 and then the Court has to take some kind of action.

3 I don't know how far he's willing to allow the  
4 questioning. And again, whether or not you make rulings,  
5 whether it's relevant, not relevant, whatever it is, but  
6 that's just what he's indicated to me, and that's what I  
7 communicated to both parties.

8 THE COURT: All right.

9 So, Ms. Roohani, if I limit your questioning to  
10 generally whether or not there's been discussion about each  
11 other's cases and how many times and for how long, do you  
12 think that would still violate his right to remain silent  
13 and not incriminate himself?

14 MS. ROOHANI: Well, Your Honor, I guess as a  
15 preliminary matter, I believe I have the right to ask him a  
16 little bit more than that. Because it's my understanding  
17 that the conversations were specifically about  
18 Mr. Humphries' guilt, not just, Hey, I have this motion  
19 pending and I'm going to file this or these are generally  
20 the charges.

21 Because I imagine that the questions that Your  
22 Honor would allow me to ask under what you're indicating is  
23 not going to get to bias at all, it's going to get to, Did  
24 you generally talk to this human being at some point during  
25 the course of your life? And I don't think that that goes

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1 to bias. And, quite frankly, I don't even understand why  
2 that would be relevant in terms of what we're trying to do  
3 here.

4 And I'm in an awkward position, Your Honor,  
5 because I think if I explain to you why I have a good faith  
6 basis to ask these questions, I think you would understand  
7 why it would be an abuse of discretion for you to not allow  
8 me to ask these questions going to actual bias under the  
9 Ninth Circuit authority.

10 So I don't want to do it publicly, Your Honor.  
11 I don't know if we can have a sidebar where I can discuss  
12 it.

13 I've briefly discussed it with Ms. Connolly.  
14 But I think if I explain to you why I have a good faith  
15 basis, you'll understand a little bit more. If you would  
16 entertain a sidebar.

17 MS. CONNOLLY: And, Judge, I have some -- well,  
18 since they're going to get into this, I will put on the  
19 record that it's been communicated to me by Mr. Ericcson on  
20 at least a couple of occasions that he's been asked -- that  
21 the government has -- Ms. Roohani has asked him to  
22 communicate to his client that the government, if he does  
23 not testify truthfully, will seek obstruction of justice  
24 and perjury charges against him. Not on one occasion, but  
25 on several occasions that's been communicated to him.

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1                   And I consider that to be their attempt to  
2                   intimidate this witness into not testifying on my client's  
3                   behalf -- or not testifying at all. Because it's been  
4                   several times. And how can they be privy to conversations  
5                   they've had between the two of them? I think it's an  
6                   attempt to preclude him from coming in and testifying and  
7                   intimidating him.

8                   THE COURT: All right. Well -- so what is --  
9                   so, Ms. Roohani, what is your proffer for the good faith  
10                  basis? Why does that need to be sealed or off -- or  
11                  outside the presence of the public?

12                 MS. ROOHANI: I'm concerned that it might put  
13                 Mr. Fuechtener at risk of harm.

14                 And I've been instructed by my office to not put  
15                 it on the public record, Your Honor. So if you're not  
16                 inclined to take it at sidebar --

17                 THE COURT: All right. Well, then why don't we  
18                 go ahead then -- I don't think there's very many people  
19                 here who aren't part of the case. I think I recognize just  
20                 about everyone except for maybe two people. Is that right?  
21                 I don't know if maybe they belong to any of the counsel.

22                 Ms. Connolly, anybody with you maybe?

23                 MS. ROOHANI: I believe there's one -- just one  
24                 member of the public here, Your Honor.

25                 THE COURT: Just one?

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1 MS. ROOHANI: Uh-huh.

2 THE COURT: All right. So if you don't mind,  
3 that one person, is it -- all right. All right. If you  
4 don't mind, it's easier if you just step outside, and we'll  
5 close the doors, and then we'll let you know as soon as  
6 we're able to go back on the public record.

7 (Record sealed from 3:05 p.m. to 3:27 p.m.)

8 THE COURT: Okay. So we're going to go ahead  
9 now and unseal the courtroom so that we can let the public  
10 back in.

11 We're going to take about a 10-minute bathroom  
12 break as well.

13 MS. ROOHANI: Thank you, Your Honor.

14 THE COURT: And then we're going to resume.

15 And are you going to call Mr. Fuechtener?

16 MS. CONNOLLY: Correct, Your Honor.

17 THE COURT: Okay. So that will be the plan.

18 We'll be back -- it's 3:23. Be back about 3:35.

19 MS. ROOHANI: Thank you, Your Honor.

20 COURTROOM ADMINISTRATOR: Off record.

21 (Recess from 3:27 p.m. until 4:07 p.m.)

22 COURTROOM ADMINISTRATOR: All rise.

23 THE COURT: All right. Thank you. You may be  
24 seated.

25 All right. So the hearing is no longer sealed.

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1                   And, Ms. Connolly, you may go ahead and call  
2 your next witness.

3                   COURTROOM ADMINISTRATOR: Please raise your  
4 right hand.

5                   You do solemnly swear that the testimony you  
6 shall give in the cause now before the Court shall be the  
7 truth, the whole truth, and nothing but the truth, so help  
8 you God?

9                   THE WITNESS: Yes.

10                  COURTROOM ADMINISTRATOR: Thank you, sir. You  
11 may be seated.

12                  Please state and spell your full name for the  
13 record.

14                  THE WITNESS: Jan Rouven Fuechtener.

15                               JAN ROUVEN FUECHTENER

16                   called as a witness on behalf of the  
17 Defense, was examined and testified as follows:

18                               DIRECT EXAMINATION

19 BY MS. CONNOLLY:

20       Q.       Do you mind if I call Jan?

21       A.       Yeah, you can.

22       Q.       And you were indicted on March 30th of 2016, when a  
23 federal indictment was filed against you; right?

24       A.       Can you speak a little bit louder.

25       Q.       On March 30th, 2016? In March of 2016, there was an

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1 indictment filed against you in federal court; right?

2 A. Yes.

3 Q. And had you -- at that point in time, did you have  
4 counsel that had been previously hired to represent you?

5 A. Yes.

6 Q. And who was that?

7 A. It was Jess Marchese.

8 Q. Okay. And Mr. Marchese, how did you come in contact  
9 with Mr. Marchese?

10 A. Steve Pacitti recommended him.

11 Q. And how did you know Steve Pacitti?

12 A. He was my entertainment lawyer.

13 Q. And for how long had Mr. Pacitti represented you?

14 A. Probably since 2012.

15 Q. 2012. Let me ask you. You are not a native of the  
16 United States; right?

17 A. No.

18 Q. And where were you born?

19 A. In Germany.

20 Q. Where were you educated?

21 A. In Germany.

22 Q. And what was the extent of your education in  
23 Germany?

24 A. I never -- it's -- I could study. I think that's --

25 Q. Did you go to college?



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1       A.       It's a high school diploma. I did 13 years of  
2 school and could go to college.

3       Q.       Okay. So you didn't go to college in Germany?

4       A.       No.

5       Q.       Okay. When did you come to the United States?

6       A.       I came here, like -- the first time I came here when  
7 I was 18 on vacation and to see (indiscernible) and magic  
8 shows.

9                   And then from nearly every other year, but on  
10 vacation.

11      Q.       When did you move to the United States?

12      A.       In 2000 -- we came here -- November 2010.

13      Q.       2010. And how old were you at that time?

14      A.       Well, I'm born 1977.

15      Q.       33?

16      A.       Yeah, it's already eight years.

17      Q.       Okay. So -- and your primary language is what?

18      A.       German.

19      Q.       But you obviously -- what's your understanding of  
20 the English language? You speak it, you read it?

21      A.       Yes.

22      Q.       Okay. Fluently speak it?

23      A.       Well, it's -- I -- it's hard to explain. Sometimes  
24 when I'm in a discussion, it's hard to find nuances, like  
25 it's black and white, good or bad. Especially like in a

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1 legal or in a business setting, it's hard to -- when it's a  
2 discussion, I don't find the right words.

3 Q. If there's a lot of people talking --

4 A. So it was always a disadvantage in business because  
5 you have always a disadvantage against native speakers  
6 because you always look for the right words, especially  
7 when I'm nervous or when it's like a business discussion  
8 and you need to find the right words quick.

9 Q. So if there's a lot of people --

10 MS. ROOHANI: Objection. Nonresponsive.

11 MS. CONNOLLY: I'm sorry. I didn't hear you.

12 MS. ROOHANI: It's nonresponsive to the  
13 question.

14 BY MS. CONNOLLY:

15 Q. Do you understand every word that's spoken in the  
16 English language?

17 A. No.

18 Q. Okay. Do you understand generally -- what about  
19 your comprehension of the written English language? How  
20 would you describe that?

21 A. It depends what -- what kind of document it is. If  
22 it's like the menu in Pahrump, of course I can read that.  
23 If it's --

24 Q. Okay. You need to speak slowly.

25 A. If it's the menu in Pahrump or something like that,

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1 everyday things, I, of course, can read and know what it  
2 means.

3 When it's a novel, I have to look up certain  
4 words.

5 When it's something legal, I would look it up or  
6 ask people.

7 Q. Okay. Let me go back to Mr. Pacitti.

8 So Mr. Pacitti, you indicated, started  
9 representing you in about 2000 and --

10 A. '12.

11 Q. '12. How would you describe your relationship with  
12 Steve Pacitti?

13 A. Good.

14 Q. You trusted him?

15 A. Yes.

16 Q. So he was the one that recommended Mr. Marchese to  
17 you?

18 A. Yes. That was the only lawyer I knew, and I called  
19 him.

20 Q. Okay.

21 A. And we went to dinner, and he said -- I explained to  
22 him what happened, and he said, Well --

23 Q. Okay. Without -- we don't want to get into anything  
24 that Mr. Marchese said.

25 Okay. So you hired Mr. Marchese. And then did

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1       there come a point in time when you hired -- or more  
2       lawyers were hired on your behalf?

3       A.       Yes.

4       Q.       Were you in custody --

5                   MS. ROOHANI: I'm sorry. Can you -- can you  
6       repeat that? I didn't understand what you said.

7       BY MS. CONNOLLY:

8       Q.       Was there a time where other lawyers were hired on  
9       your behalf?

10      A.       Ask the question again.

11      Q.       Okay. Did there come a point in time when other  
12      lawyers were hired on your behalf to represent you?

13      A.       Yes.

14      Q.       Okay. And when was that, approximately?

15      A.       That was --

16      Q.       March of 2016?

17      A.       Yeah. It was after I got arrested but before I went  
18      to the court to --

19      Q.       Before the --

20      A.       -- you call that.

21      Q.       Before the indictment. But the time of the  
22      detention hearing, there was more than just Mr. Marchese  
23      representing you; right?

24      A.       Yes. That was later.

25      Q.       Okay. So you had Mr. Marchese, and then you hired

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1 Nadig and Sanft?

2 Upon whose --

3 A. Yes.

4 Q. Who recommended to you that you hire Nadig and  
5 Sanft?

6 A. Steve Pacitti. And he recommended Ben Nadig.

7 Q. Okay. And would it be fair to say that Mr. Sanft  
8 made an appearance on the record; in other words, he filed  
9 something with the Court representing that he was your  
10 lawyer on April 2nd, 2016?

11 A. Yes.

12 Q. Okay. And I'm going to fast forward a bit.

13 In July of 2016, you substituted Mr. Durham in  
14 place -- instead in place of Mr. Sanft; right?

15 A. I don't know the exact date. But if you have that,  
16 it was -- yeah, that sounds right.

17 Q. Okay. Without telling me what anybody else said,  
18 what were the circumstances that caused you to release  
19 Mr. Sanft and retain Mr. Durham to represent you?

20 A. I had a meeting in Henderson with Jess. It was over  
21 the video screen. And he said, "Jan" --

22 MS. ROOHANI: Objection. Hearsay.

23 BY MS. CONNOLLY:

24 Q. I said without saying what anybody else told you.

25 A. Okay. Well, what --

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1 Q. Okay. He ended --

2 A. Ask again.

3 Q. What was it that caused you to hire -- to release  
4 Mr. Sanft and hire Mr. Durham in his place?

5 A. I felt that Mr. Sanft is doing nothing.

6 Q. Okay. And who was it that caused you to believe  
7 that?

8 Without telling me what they said, who was it  
9 that caused to you feel that way?

10 MS. ROOHANI: Objection.

11 BY MS. CONNOLLY:

12 Q. Or did you feel that way on your own?

13 MS. ROOHANI: Objection. Answer will cause --  
14 call for hearsay.

15 MS. CONNOLLY: I'm not asking him what was said.

16 MS. ROOHANI: If his --

17 BY MS. CONNOLLY:

18 Q. Caused -- what caused you to feel that way?

19 A. Yeah. Initially that was Jess --

20 Q. So after you had discussions with Jess, you felt  
21 Mr. Sanft not doing enough on your case?

22 A. Yes. Jess, in a way, opened my eye --

23 Q. You can't say what anybody else said.

24 A. No, he didn't say anything, but he opened my eyes  
25 with -- what I learned after that conversation with Jess

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1 was that --

2 MS. ROOHANI: Objection. Hearsay.

3 THE COURT: Overruled. I'm not sure if it's the  
4 truth of the matter asserted.

5 BY MS. CONNOLLY:

6 Q. Go ahead.

7 A. Well, I felt he's doing nothing.

8 Q. Okay. Well what was your understanding of what  
9 Mr. Nadig's involvement in your case was?

10 A. To work together with Michael Sanft on my defense.

11 Q. What about Marchese? What was the difference  
12 between Marchese, Sanft, and Nadig?

13 A. They all were supposed to work together.

14 Q. And you?

15 A. Yes.

16 Q. Okay. At any point in time did you, in writing or  
17 orally, indicate that you waived any conflict and any of  
18 those attorneys representing you and also representing  
19 Frank?

20 A. Ask it again.

21 Q. Okay. At any point in time did you sign a waiver  
22 saying that it was okay for Mr. Nadig to represent you and  
23 represent Frank, your husband?

24 A. No.

25 Q. Did you ever orally have a discussion with Mr. Nadig

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1 about any potential conflicts and him representing you and  
2 representing Frank?

3 A. No.

4 Q. Did you ever orally represent to Mr. Nadig that you  
5 would waive any conflict in him representing you and also  
6 representing Frank?

7 A. No.

8 Q. Now, Frank is your husband; right?

9 A. Yes.

10 Q. And you and he live together?

11 A. Yes.

12 Q. And where did you live together at? What was the  
13 residence address?

14 A. Here in Las Vegas?

15 Q. Yes.

16 A. At 7080 Donald Nelson Avenue.

17 Q. Okay. And that's the home where there was some --  
18 where computers were received -- were seized, and based  
19 upon information found on those computers a federal  
20 indictment was filed against you?

21 MS. ROOHANI: Objection. Leading.

22 THE COURT: I didn't hear the last part of the  
23 question.

24 BY MS. CONNOLLY:

25 Q. That's the home where those items seized, and based



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1 upon information that was on those computer a federal  
2 indictment was filed against you?

3 MS. ROOHANI: Objection. Leading.

4 THE COURT: I think the Court can take judicial  
5 notice of that, that that's the same address that's  
6 represented as where the --

7 THE WITNESS: Yes.

8 THE COURT: -- computers were found.

9 BY MS. CONNOLLY:

10 Q. Okay. And besides you and Frank, was there anybody  
11 else residing in that home?

12 MS. ROOHANI: Objection. Relevance.

13 MS. CONNOLLY: It's completely relevant in the  
14 fact that on cross-examination one of the witnesses,  
15 Ms. Roohani brought out the fact that Frank was -- or tried  
16 to establish that Frank was not the only alternate suspect  
17 because there was other individuals residing in the home.

18 THE COURT: Court agrees. Overruled.

19 BY MS. CONNOLLY:

20 Q. Was there anyone else residing in that home besides  
21 you and your husband, Frank?

22 A. Yes.

23 Q. And who was that?

24 A. There was Kevin Klepping. That's someone we know  
25 from Germany, and he wanted to relocate to Las Vegas and --

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1 Q. When --

2 A. -- help --

3 Q. When did he reside with you?

4 A. Well, with me --

5 Q. Was it for a long period --

6 A. It was during the time I was at the Tropicana --

7 Q. Was it for weeks or months?

8 A. -- met him there.

9 It was for -- the longest period was probably --  
10 I mean, don't nail me down on that, but I would say six  
11 weeks to two months. That was the longer, then he went  
12 to --

13 Q. Do you understand --

14 A. -- Germany for a while and came back.

15 Q. Do you understand the difference between somebody  
16 residing there and somebody staying there?

17 A. I would say staying means more permanent and  
18 residing could be anything else.

19 Q. Okay.

20 A. But maybe I'm wrong.

21 Q. So --

22 A. No, I don't know what that exactly --

23 Q. So this individual -- would it be fair to say, was  
24 this individual actually living in that address, or was he  
25 visiting?

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1       A.       He had his toothpaste and toothbrush and his  
2 suitcases there, so --

3       Q.       Okay.

4       A.       -- at that time he was living there, yeah.

5       Q.       And his name wasn't on the lease or on any --

6       A.       No.

7       Q.       -- of the utilities?

8               And he was there for about six weeks?

9       A.       No, that was the longest period at a time.

10      Q.       Okay. So he came and went?

11      A.       Yeah.

12      Q.       Okay.

13      A.       Again, it might be more, it might be -- I would need  
14 to, I mean, look into that.

15      Q.       So he didn't live there consistently?

16      A.       No. It was planned -- there was plan to, but he --  
17 I mean, until --

18      Q.       When I say consistently, in other words, that wasn't  
19 his only -- that was not his primary residence? That  
20 wasn't his house?

21      A.       At that time, it was. He left back to Germany after  
22 the search and said, "This is all too much for me, and  
23 I'm -- I don't want to work for you and" --

24      Q.       Okay. But there --

25      A.       -- "I leave."

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1 Q. Okay. What I'm trying to establish is, you and  
2 Frank owned this house together --

3 A. Yes.

4 Q. -- right?

5 That was your house?

6 A. Yes.

7 Q. And this individual from Germany, he was a guest in  
8 your home? You said, "Come stay with me" --

9 A. Yes.

10 Q. -- "in my" --

11 A. Yes.

12 Q. -- "in our home"?

13 A. Yes.

14 Q. And that home was one that you and Frank owned?

15 A. Yes.

16 Q. And how long had you and Frank lived in that house?

17 A. I think we moved in -- it was around Christmas. I  
18 would say it was Christmas 2012.

19 Q. Okay. So you had lived in that --

20 A. And I'm not sure about that. We moved in  
21 Christmas --

22 Q. It would be fair to say you and Frank lived in that  
23 house together for a number of years?

24 A. Yes.

25 Q. And this individual came and went, and the longest

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1 period of time he ever spent, you said, was six weeks?

2 A. Yeah. Maybe two months --

3 Q. Okay.

4 A. -- maybe six weeks.

5 Q. Did he have full rein of the home?

6 A. Yes.

7 Q. He could go everywhere in the house?

8 Do you know what I meant when I say "full rein  
9 of the house"?

10 A. Yes.

11 Q. Okay. Does this individual have full rein of the  
12 house? In other words, was he able to go everywhere?

13 A. Well, there were areas of exclusivity. For example,  
14 he didn't go into my walk-in closet.

15 Q. He wasn't allowed --

16 A. Or my bathroom, you know, because it's my bathroom.  
17 We had enough, so he wasn't there.

18 But we never talked about that, but that was --

19 Q. Okay.

20 A. -- understood.

21 Q. Okay. So you indicated that the reason -- okay.

22 You said you let Sanft go and you put Durham on  
23 because you were concerned that he wasn't doing anything on  
24 the case?

25 A. Yes.

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1 Q. What about Nadig? Did he continue to be -- or did  
2 you think he continued to be your lawyer, or was he fired?  
3 Or what was your understanding of what his ongoing  
4 involvement in the case was?

5 A. That he is my lawyer. He had one time where he  
6 said, "I have a" --

7 Q. Don't tell --

8 A. -- "capital murder case in" --

9 Q. -- you can't --

10 A. -- "Utah" --

11 MS. ROOHANI: Ob --

12 BY MS. CONNOLLY:

13 Q. You can't say what anybody else said --

14 A. Okay.

15 Q. Okay. You can't say what anybody else said to you.

16 A. Yeah. He --

17 Q. Okay. So in July of 2016, when Durham substituted  
18 in for Sanft, who was on your defense team at that point in  
19 time, to your knowledge?

20 A. Jess. Can I call him Jess?

21 Q. Yes.

22 A. Jess and Benjamin Durham.

23 Q. And what about -- so what was Nadig doing?

24 A. Nadig was working in the background. But, I mean,  
25 at that time we took off -- I took off Michael Sanft, who

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1 works in hand with Nadig, or worked in hand with Nadig on  
2 my case.

3 So when I took him off, the first question was,  
4 Well, you might get money back because now he's off the  
5 case, he didn't do anything. That was what -- what I  
6 learned from a conversation with Mr. Pacitti.

7 So at that point I was --

8 MS. ROOHANI: Objection. Hearsay.

9 MS. CONNOLLY: Marchese.

10 THE WITNESS: Mr. Pacitti.

11 BY MS. CONNOLLY:

12 Q. Okay. So you had -- you had met with both  
13 Mr. Marchese and Mr. Pacitti and discussed what Mr. Sanft  
14 and/or Mr. Nadig were doing on the case? Is that fair to  
15 say? Prior to July.

16 A. With Mr. Marchese, yes. And then with Mr. Pacitti,  
17 the conversations were about --

18 Q. When?

19 A. -- getting a refund.

20 That was shortly after --

21 Q. After --

22 A. -- I took Mr. Sanft off the case.

23 Q. Well, if you look at Exhibit C, which is in front of  
24 you.

25 Did you ever get a copy of that e-mail?

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1 A. Yes.

2 Q. And how did you receive a copy of that e-mail? If  
3 you recall?

4 A. Jess brought it to me --

5 Q. Okay.

6 A. -- during a visit.

7 Q. Do you know when he brought that to you?

8 A. No.

9 Q. Would it be September of 2016?

10 A. Well, I can't say what he said, so he -- he brought  
11 it. And I learned after when I back --

12 MS. ROOHANI: Objection. Hearsay.

13 BY MS. CONNOLLY:

14 Q. Just -- my question was when -- okay. You can't say  
15 what anybody else said to you. Okay?

16 When do you believe --

17 A. I received it about two weeks after it got sent.

18 Q. Okay. Now, let me ask you. Prior to receiving that  
19 e-mail, had you had any discussion with any of the lawyers  
20 about accepting a plea on this case?

21 A. No.

22 Q. Had you had any discussion with any of your lawyers  
23 about the United States Sentencing Guidelines?

24 A. No.

25 Q. Had any of your lawyers come and met with you with



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1 the United States Sentencing Guideline book and gone and  
2 went over it with you?

3 A. No.

4 Q. Did any of your lawyers discuss with you that based  
5 upon materials that were disclosed on the images that you  
6 would be facing --

7 MS. ROOHANI: Objection. Leading.

8 MS. CONNOLLY: I can strike that.

9 BY MS. CONNOLLY:

10 Q. So at no point in time prior to September 2016 did  
11 any lawyer go over a guideline book with you?

12 A. No.

13 Q. And there was no discussion about plea, pleading  
14 out?

15 MS. ROOHANI: Asked and answered.

16 THE WITNESS: No.

17 BY MS. CONNOLLY:

18 Q. Had you indicated to any of your lawyers prior to  
19 September of 2016 that you were interested in accepting any  
20 kind of plea negotiations?

21 A. Ask it again.

22 Q. Prior to September 2016, had you indicated to any of  
23 your lawyers that you were willing to entertain any kind of  
24 plea negotiation?

25 A. No.

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1 Q. Okay. Did Mr. Nadig -- do you recall if Mr. Nadig  
2 met with you on September 7, 2016?

3 A. If he met with me on September 7, 2016?

4 Q. The day of the e-mail is September 3rd.

5 Do you remember that after that e-mail you  
6 received a visit from Mr. Nadig?

7 A. Yes.

8 Q. Okay. And how did you feel -- after you had that  
9 conversation with Mr. Nadig, how were you feeling?

10 A. Confused.

11 Q. Okay. And that was based upon representations that  
12 were made by Mr. Nadig, or what made you feel confused?

13 A. The whole situation. And, yes, representations he  
14 made.

15 Q. Okay. How did you feel when you received a copy of  
16 that letter, that e-mail?

17 A. Terrified.

18 Q. So when you received that e-mail, and after you had  
19 a visit from Mr. Nadig, what did you do? What did you do  
20 about the information that was disclosed in that e-mail and  
21 by Mr. Nadig?

22 A. I talked with him about it and asked him about  
23 certain things he's saying, how he -- how he means it and  
24 what is it all about.

25 Q. Did he make you feel better after he explained the

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1 e-mail?

2 A. Yes, a little. Yeah. He did.

3 Q. Okay. And what did you do as a result -- after you  
4 spoke with Mr. Nadig, did Mr. Marchese come meet with you?

5 A. Yes.

6 Q. And how did --

7 A. Actually, I expected Mr. Marchese when Mr. Nadig  
8 came.

9 MS. ROOHANI: Objection. Nonresponsive. And  
10 there's no pending question.

11 THE WITNESS: Okay.

12 BY MS. CONNOLLY:

13 Q. Mr. -- did Mr. --

14 A. Okay.

15 Q. In relation to the time frame of this e-mail, who  
16 met with you first, Nadig or Marchese?

17 A. Mr. Nadig.

18 Q. Okay. And when did Mr. Marchese meet with you,  
19 shortly thereafter, a couple days later?

20 A. The same day.

21 Q. Okay. And was that at your request?

22 A. No.

23 Q. Okay. And how did you feel about the relationship  
24 between Nadig and Marchese?

25 A. After -- before this e-mail, it was, I would say, a

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1 professional, like colleagues work together.

2 But after that e-mail, that was no longer the  
3 case.

4 Q. And how did you feel -- how did you think -- what  
5 was your belief or feeling about their relationship at that  
6 point and the fact that Nadig was still on your team and  
7 Marchese was still on your team?

8 A. Say the last part again.

9 Q. Okay. How did you feel after you received the  
10 e-mail and after talking with Marchese and Nadig about them  
11 both representing you on this case? How did you feel about  
12 that?

13 A. Confused.

14 Q. Okay. Did -- did you discuss your concerns with  
15 Mr. Marchese and Mr. Nadig?

16 A. With Mr. Marchese, I did.

17 Q. Okay. And did you decide to do anything as a result  
18 of your conversation with Mr. Marchese?

19 A. On that day?

20 Q. At any subsequent time?

21 A. I put Michael Sanft -- following those  
22 conversations, I decided to put Michael Sanft back on the  
23 case.

24 Q. Okay. Now, did you also -- let me ask you a little  
25 bit about -- who is it that convinced you to put -- or did

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1 somebody convince you to put Sanft back on the case?

2 MS. ROOHANI: Objection --

3 THE WITNESS: Yes.

4 MS. ROOHANI: -- calls for hearsay.

5 MS. CONNOLLY: Not for the truth -- I'm not  
6 asking him what they said, I'm asking if he did  
7 something --

8 MS. ROOHANI: But if --

9 MS. CONNOLLY: -- as a result of that.

10 MS. ROOHANI: -- they convinced him, Your Honor,  
11 then I think you can infer what the conversation was about.

12 THE COURT: Sustained.

13 BY MS. CONNOLLY:

14 Q. After your con- -- after your meeting with  
15 Mr. Nadig, what did you do as a result of your -- did you  
16 bring anybody else back on the case as a result --

17 A. Yes.

18 Q. -- of your discussions?

19 And who was that?

20 A. Mr. Sanft.

21 Q. Okay. Amber Craig was brought on the case. What  
22 was your thinking about that? Why was Amber Craig brought  
23 on to the case?

24 Without telling me what anybody else said, why  
25 did you decide to bring Amber case -- Craig back on to the

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1 case?

2 A. I wanted to have a female lawyer in my defense  
3 team --

4 Q. Okay.

5 A. -- for trial --

6 Q. Was that --

7 A. -- because the initial --

8 Q. -- your idea?

9 A. -- idea --

10 Q. Was that your idea, or was that an idea that was  
11 raised by somebody else?

12 MS. ROOHANI: Objection. Hearsay.

13 MS. CONNOLLY: I'm not asking him what they said  
14 or what -- who said it, I'm asking if it was his idea or  
15 somebody else's. That's not hearsay.

16 MS. ROOHANI: Same as before, Your Honor.

17 THE COURT: Just asking if that was his idea?

18 MS. ROOHANI: No, whose --

19 THE COURT: Well, he can answer.

20 Was that your idea to bring in Amber Craig? Or  
21 a woman, rather, just any woman?

22 THE WITNESS: I had a conversation with  
23 Mr. Marchese about it, and that's how -- you know, you work  
24 with a lawyer and you talk, and then I -- I would say it  
25 was both our idea.

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1 BY MS. CONNOLLY:

2 Q. Well, after --

3 A. But I -- once I thought about it, I said, "Yes, I  
4 want that."

5 Q. Okay.

6 A. So --

7 Q. So after discussion with Mr. -- and this was all  
8 preceding that e-mail from Mr. Nadig?

9 A. (No audible response.)

10 Q. After the e-mail from Mr. Nadig, you had a  
11 discussion with Mr. Marchese and decided you wanted to  
12 bring Amber Craig on to the case?

13 A. Yes.

14 Q. Okay. Well, at that point in time, what was your  
15 understanding of what Mr. Nadig's involvement was in your  
16 defense? Was he on the case, off the case, or --

17 A. I had -- my feeling was that he works on my case but  
18 officially stays -- as far as court hearings, stays in the  
19 background.

20 So he wouldn't come here when there was a  
21 hearing, and he wouldn't be on official-like documents on  
22 the record. But he worked on my case.

23 Q. Okay.

24 A. He worked on my defense.

25 Q. And so you listened to what he had to say?

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1 A. Yes.

2 Q. So let me take the hearing on October 10, 2016. It  
3 was calendar call.

4 What do you remember happening on that day in  
5 regard to Amber Craig.

6 A. She wasn't here. She didn't appear.

7 Q. Okay. On October 14th, just to orient you as to the  
8 date, was there a motion filed by the prosecution in regard  
9 to Amber Craig's involvement on your case?

10 A. Yes.

11 Q. Okay. And that was a motion to disqualify your  
12 entire defense team; right?

13 A. Yes.

14 Q. And how did you feel when you saw and read that  
15 motion? Did you get a copy of the motion?

16 A. No.

17 Q. You were never provided with a copy of it?

18 A. No.

19 Q. Okay. You were present in the hearings, though,  
20 involving that motion; right?

21 A. I met with Jess and I think Mr. Durham at that  
22 point, and they -- I mean, I -- yeah, I met with them. And  
23 then after the meeting I knew there's a problem.

24 Q. And how did that make you feel when the government  
25 moved to disqualify your entire defense team?



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1       A.       I was afraid that I lose her and eventually my whole  
2 defense team, like just weeks before trial -- and besides  
3 everything else what happened before, that concerned me.  
4 It was just one more problem to deal with.

5       Q.       Okay. Now, was Mr. Sanft on the defense team at  
6 that point, or had he not been brought back on yet?

7       A.       That's a good question.

8               No, he hasn't been brought on.

9       Q.       He was brought on --

10      A.       He was brought on after that whole Amber Craig  
11 issue.

12      Q.       Okay. Okay. I had asked you if prior to September  
13 there had been any discussion about pleading guilty or  
14 accepting a plea.

15              What about prior to trial? Between September  
16 and trial, which is in November, did you ever indicate to  
17 your defense team that you wanted to negotiate the case or  
18 ask him to negotiate your case?

19      A.       No.

20      Q.       Okay. During that period of time, did any member of  
21 your defense team come down and sit with you and go over  
22 the United States Sentencing Guidelines with you?

23      A.       No.

24      Q.       I'm showing you a copy of the federal sentencing  
25 guidelines manual.

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1                   Did anybody ever sit down and go over any  
2 provisions of this book with you?

3       A.       Yes.

4       Q.       They did. And when was that?

5       A.       That was last -- last summer.

6       Q.       Okay. Prior to you entering your guilty plea, did  
7 anybody sit down with a book like that --

8       A.       No.

9       Q.       -- and go over -- okay.

10      A.       I mean, to be clear, that was you last summer.

11               MS. ROOHANI: Objection. Hearsay.

12               THE COURT: How is that hearsay?

13               MS. CONNOLLY: That's not hear --

14               THE COURT: He met with her for the first time  
15 when he met with counsel?

16 BY MS. CONNOLLY:

17      Q.       So it's your testimony the first person that went  
18 over United States Sentencing Guidelines, that book, with  
19 you was me?

20      A.       Yes.

21      Q.       And that was last summer? Summer of 2017?

22      A.       Yes.

23      Q.       Okay. So --

24               THE COURT: Just to be clear, counsel showed the  
25 2016 version, and I'm not really sure how -- how often --

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1 MS. CONNOLLY: It was the --

2 THE COURT: -- defense attorneys buy a new  
3 version.

4 MS. CONNOLLY: It's the gray 2016 version.

5 THE COURT: Right. So I'm not sure if it was --

6 MS. CONNOLLY: I guess I need to upgrade, but --

7 THE COURT: Yeah, I'm not sure if at the time it  
8 was the gray 2016 or the kind of aqua/turquoise 2015.

9 Either of these books look familiar to you?

10 THE WITNESS: This looks familiar.

11 THE COURT: Okay. And that -- and he's pointing  
12 to the gray 2016.

13 BY MS. CONNOLLY:

14 Q. Prior to trial, did anybody explain to you or go  
15 over -- between September and trial, did anybody ever go  
16 over with you the fact that the sentence you get is based  
17 upon number of images, kind of images, length of videos, or  
18 anything of that nature?

19 A. I had a general understanding that, of course, what  
20 the facts are influence a possible sentence.

21 Q. What --

22 MS. ROOHANI: Objection. Nonresponsive.

23 THE COURT: Overruled.

24 BY MS. CONNOLLY:

25 Q. Well, what was your understanding prior to trial of

—TRANSCRIBED FROM DIGITAL RECORDING—

1 what the sentencing structure was in federal court?

2 A. I had no idea about that.

3 Q. When was the first time -- when was the first time  
4 that there was any discussions about you potentially  
5 accepting a plea negotiation on your case?

6 A. That was after -- during trial in the break of  
7 Ms. Panovich's testimony.

8 Q. Okay. And how did you feel -- who broached the  
9 issue of -- without saying what they said, who was the one  
10 that raised the prospect of your pleading --

11 A. Mr. Marchese.

12 Q. -- accepting a guilty plea?

13 Who?

14 A. Mr. Marchese.

15 Q. Mr. Pacitti?

16 A. Marchese.

17 Q. Marchese.

18 A. Jess Marchese.

19 Q. Marchese. Mr. Marchese.

20 A. Yes. Sorry.

21 Q. And how did that make you feel?

22 A. Confused.

23 Q. And why were you confused?

24 A. He was -- I never like -- yeah, confused. Extremely  
25 confused.

—TRANSCRIBED FROM DIGITAL RECORDING—

1 Q. And why were you confused?

2 A. Because we never talked about a deal. We in the  
3 middle of trial. My counsel decided on calendar call, yes,  
4 we're ready. We go to trial. This is a case -- a case  
5 which has -- how did -- yeah, we can take this case to  
6 trial.

7 They didn't say, "We need time before," they  
8 said, "Well, we need another month for this, we need  
9 another month" --

10 Q. Don't say what anybody said to you.

11 A. But they -- yeah.

12 Q. You said --

13 A. With that understanding they go to trial and we go  
14 through trial from the beginning to end with a defense,  
15 with mounting a defense.

16 Q. Okay. So you said you felt confused?

17 A. Yes.

18 Q. Okay. And then --

19 A. Anxious. I got like -- yeah.

20 Q. Okay. And what was your understanding of the plea  
21 that was being extended to you before you got the guilty  
22 plea?

23 A. On that day?

24 Q. Yes.

25 A. That the -- I mean, there was no plea yet. That the

—TRANSCRIBED FROM DIGITAL RECORDING—

1 government would drop the advertising charge, which carries  
2 a 15-year minimum, and that that would mean the new minimum  
3 then would be five years.

4 Q. Okay. On that day in court, what was your  
5 understanding what your exposure would be under the plea  
6 agreement that was being discussed?

7 A. On that day, after talking to Mr. Pacitti,  
8 Mr. Marchese, Mr. Durham, Mr. Sanft, I thought it will be  
9 between 5 and 15 years.

10 Q. Okay. Did anybody explain to you how the plea  
11 agreement would work? Or what would be contained in the  
12 plea agreement?

13 A. I knew at that point that it will be a written  
14 contract with lots of details in it which need to be  
15 figured out.

16 Q. Okay. What was your understanding of how the  
17 sentence would be calculated?

18 A. I had at that point no idea. I never thought about  
19 that.

20 Q. So all you're aware is that you're looking at 5 to  
21 15?

22 A. Yes.

23 MS. ROOHANI: Objection. Misstates testimony.

24 BY MS. CONNOLLY:

25 Q. What was your understanding, after you had that

—TRANSCRIBED FROM DIGITAL RECORDING—

1 meeting with your counsel -- nobody came and met with you  
2 that night; right?

3 A. No.

4 Q. And what was your understanding of the amount of  
5 time that the judge could give you under the plea agreement  
6 that was being written up by the government?

7 A. What my understanding was?

8 Q. Yes.

9 A. Well, I learned that --

10 Q. Well, just at that point in time?

11 A. At that point in time, I knew that it can't be  
12 predicted, but it -- it will be in that range.

13 Q. Okay. In light of the fact that you had indicated  
14 that it was never your intention to take any kind of guilty  
15 plea, why, at this point, were you then willing to  
16 entertain a guilty plea?

17 A. I thought I have no other choice. My -- I lost --  
18 at that point, when Mr. Marchese brought that idea, I lost  
19 all my -- at that moment, I lost all my confidence in my --  
20 in my defense team and what -- what Mr. Nadig said months  
21 before (indiscernible) in my head, and it was, like, yes,  
22 he was all along right.

23 Q. Who was all along right?

24 A. Mr. Nadig.

25 Q. And what did you mean by that?

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1 MS. ROOHANI: Objection. Calls for hearsay.

2 BY MS. CONNOLLY:

3 Q. What was the impression that Mr. Nadig left you in  
4 regards to the competency of the people that were -- you  
5 were going to trial with, that were going to try the case?

6 A. That with --

7 MS. ROOHANI: Objection. Calls for hearsay.

8 MS. CONNOLLY: It doesn't -- it was the  
9 impression that was left with him.

10 MS. ROOHANI: The impression that --

11 THE WITNESS: My --

12 MS. CONNOLLY: Which is relevant to his --  
13 relevant to his request to withdraw the guilty plea.

14 THE WITNESS: With --

15 MS. CONNOLLY: Wait. The judge has to rule.

16 THE COURT: Well, it's sustained.

17 But you could ask him why he lost confidence in  
18 his defense team.

19 BY MS. CONNOLLY:

20 Q. Why did you lose confidence in your defense team?

21 A. Because of the things from the conversation and the  
22 e-mail with Mr. Nadig, they (indiscernible) in my head, and  
23 I felt they --

24 Q. Well, what --

25 A. That they're unprepared, that they -- that this is



—TRANSCRIBED FROM DIGITAL RECORDING—

1 way over their head, that they ill-equipped, that they --  
2 they --

3 Q. Was that --

4 A. A lawyer who in the middle of trial says, "Well,  
5 have you ever thought about a deal?" when the whole year  
6 before that never was brought up, I thought a lawyer who  
7 think he can't win at trial, he won't win at that point; a  
8 lawyer who thinks he can win, he can win.

9 At that point, I felt they -- we can't win if  
10 they say, "Well, have you ever thought about a plea?"

11 Q. Did that e-mail that you received from Mr. Nadig  
12 play into how you felt?

13 A. Yes.

14 Q. And what about your discussions with Mr. Nadig and  
15 his comments in regard to the defense that was being  
16 presented by Marchese?

17 A. I thought I made a mistake by not following Nadig's  
18 advice at that point.

19 Q. Say that again.

20 A. I thought I made a mistake by not following Nadig's  
21 advice as --

22 MS. ROOHANI: Objection.

23 THE WITNESS: -- on that point.

24 BY MS. CONNOLLY:

25 Q. Now, if you had followed Nadig's advice, what would

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1 you have done previously?

2 MS. ROOHANI: Objection. Calls for hearsay.

3 MS. CONNOLLY: No, it doesn't.

4 MS. ROOHANI: If he'd followed his advice, that  
5 would be hearsay.

6 BY MS. CONNOLLY:

7 Q. What would you have --

8 THE COURT: Sustained.

9 BY MS. CONNOLLY:

10 Q. -- have done?

11 MS. CONNOLLY: I didn't ask him what the advice  
12 was.

13 THE COURT: Sustained.

14 THE WITNESS: I would have put --

15 THE COURT: It was sustained.

16 She can ask a different question.

17 MS. CONNOLLY: Okay.

18 THE COURT: Or just reformat it so that --

19 BY MS. CONNOLLY:

20 Q. Would it be fair to say that you were getting -- how  
21 would you say the information that you were getting from  
22 Mr. Sanft -- Mr. Nadig compared with the information you  
23 were getting from Mr. Marchese prior to November 17?

24 MS. ROOHANI: Objection. Calls for --

25

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1 BY MS. CONNOLLY:

2 Q. Was it consistent?

3 MS. ROOHANI: -- hearsay.

4 MS. CONNOLLY: It's not -- I'm not asking for  
5 the truth of the matter of anything.

6 THE COURT: Overruled. He can answer the  
7 question.

8 BY MS. CONNOLLY:

9 Q. How would you compare the advice you were getting  
10 from Nadig versus the advice you were getting from  
11 Marchese? Was it --

12 A. At that point?

13 Q. Was it consistent or conflicting?

14 A. Conflicting.

15 Q. Would it be fair to say that you chose to go with  
16 one over the other prior to the plea?

17 A. It was like a roller coaster ride. It was up and  
18 down. It was that team and then the next came in and  
19 said -- and then the next day I came in, and after that I  
20 decided to put another lawyer back on the case, and then I  
21 had another one. This is -- I mean, as the record  
22 states --

23 Q. Okay. You're using --

24 A. -- it changed.

25 Q. Okay. But the court reporter can't take down

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1 your -- you're using your emotions. The court reporter  
2 can't take down what you're emoting, so you need to say  
3 rather than motioning with your arms.

4 A. Yeah. I felt confused.

5 Q. Now, you indicated that when they talked about  
6 pleading guilty, you were thinking about what Nadig had  
7 said and the information that was in the e-mail?

8 A. Yes.

9 Q. And you indicated that you felt they weren't  
10 prepared or you couldn't proceed with them?

11 A. Yeah. It was, like, months before I basically  
12 learned, according to that advice, with that defense you  
13 will lose.

14 MS. ROOHANI: Objection. Hearsay.

15 MS. CONNOLLY: It's not for the truth of the  
16 matter. It's how his state of mind --

17 THE COURT: Overruled.

18 BY MS. CONNOLLY:

19 Q. So Mr. Nadig has said that to you before, and then  
20 in the middle of trial that's how you felt?

21 A. Yes. And -- I mean, of course I listened to my  
22 lawyer, the lawyer I trust.

23 Q. And who is the lawyer you --

24 A. And then --

25 Q. And who is the lawyer you trust?

—TRANSCRIBED FROM DIGITAL RECORDING—

1 A. And that changed before.

2 Q. Okay. Well --

3 A. Before trial, the defense team which I brought to  
4 trial, it was the defense team at that moment I trusted,  
5 because that's why I choose that defense team.

6 Q. Who?

7 A. Mr. Marchese and Mr. Durham and Mr. Sanft.

8 Q. And then when the prospect of a plea was raised, who  
9 did you trust?

10 A. At that moment, I lost confidence in them. And then  
11 I -- everything from these previous meetings and talks and  
12 laying down and thinking and going over things reasoned  
13 back, and I said, "Yeah, Nadig was right."

14 Q. Okay. How did those people who were advising you in  
15 the courtroom that day, Pacitti, Sanft, Durham, and  
16 Marchese, at that point in time, who did you trust the most  
17 out of that group?

18 MS. ROOHANI: Objection. Relevance.

19 MS. CONNOLLY: It's relevant based upon what  
20 they were telling him. We've heard from all the witnesses.  
21 I'll be following up with that.

22 THE COURT: Overruled. He can answer the  
23 question.

24 THE WITNESS: Mr. Pacitti.

25

TRANSCRIBED FROM DIGITAL RECORDING

1 BY MS. CONNOLLY:

2 Q. So the representations he made to you in regard to  
3 how much time you were facing, did you trust what he told  
4 you?

5 A. Based on what I experienced at the defense table,  
6 yes.

7 Q. Okay. Now, the Court recessed that day. That  
8 evening did anybody come meet with you to discuss potential  
9 plea negotiations?

10 A. No.

11 Q. Okay. When was it that you were presented with a  
12 guilty plea?

13 A. The next morning in the lawyer visitation room here  
14 at the courthouse.

15 Q. Do you remember what time it was?

16 A. No. There is no clock.

17 Q. Okay. How long --

18 A. They pick us up in Henderson --

19 Q. Okay. Here, how long --

20 A. -- at 7:00, and then I was here probably at 7:40.

21 And then I was waiting a long time.

22 Q. That's not -- the question was, do you remember what  
23 time it was when they came to meet with you?

24 A. No.

25 Q. Okay. Do you remember how much time you spent

—TRANSCRIBED FROM DIGITAL RECORDING—

1 talking with Mr. Durham about the guilty plea agreement?

2 A. Not exactly.

3 Q. Did you have a copy of it?

4 A. No.

5 Q. Okay. So you heard Mr. Durham testify that he went  
6 over the guilty plea agreement. Tell us about that.

7 What happened when he went over the guilty plea  
8 agreement with you? How did that come about?

9 A. Well, he came in first. He was here before. And as  
10 I remember, he had no copy yet.

11 A short time later Mr. Marchese came with the  
12 printed out copy.

13 Q. Okay.

14 A. And then he had the copy. And then he put the copy  
15 on the table. And then a little bit later, Mr. Sanft came  
16 in and kept the door open because it's, like, not very big.

17 He was standing in the door, and Mr. Marchese  
18 was standing inside, and Mr. Durham was sitting.

19 And for the first time I had the copy and went  
20 with me --

21 Q. So you --

22 A. -- through it.

23 Q. But you didn't have a copy on your side?

24 A. No. I had to look through that mesh. Actually, I  
25 just -- I heard more what he said than looking on the

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1 document.

2 Q. So he was reading it to you?

3 A. Not line by line.

4 Q. Did he go -- you've heard our discussion about  
5 enhancements. Would he go over, A, the enhancements that  
6 were set forth in there and what that meant?

7 A. Can I -- to clarify your previous question?

8 Q. Go ahead.

9 A. I think it was like this. Okay. This is this and  
10 this means that, so he made it --

11 Q. He para- --

12 A. It's legal -- it's legal -- it's a legal contract.

13 Q. He paraphrased it?

14 A. So he said this means that and this means this and  
15 this means that, yes.

16 Q. Okay. Did he tell you what your base offense level  
17 was?

18 THE COURT: Which "he" are we talking about?  
19 Because there's three other attorneys in there.

20 MS. CONNOLLY: Okay.

21 BY MS. CONNOLLY:

22 Q. Who --

23 A. Mr. Durham.

24 THE COURT: All right.

25



—TRANSCRIBED FROM DIGITAL RECORDING—

1 BY MS. CONNOLLY:

2 Q. Mr. Durham was the one -- Mr. Durham was the one who  
3 read the plea agreement to you?

4 A. Yes. After, like, two pages, the other two lawyers  
5 left.

6 Q. Okay. So it was just you and Mr. Durham in there?

7 A. Yes.

8 Q. Okay. Did he and -- what did he tell you about your  
9 base offense level? Did you understand it was a level 40?

10 MS. ROOHANI: Objection. That misstates the  
11 plea agreement.

12 BY MS. CONNOLLY:

13 Q. Did you understand that the adjusted base offense  
14 level under the plea agreement was a level 40? 4-0?

15 THE COURT: You said 40 or 14?

16 MS. CONNOLLY: 40.

17 THE COURT: 40.

18 MS. CONNOLLY: 4-0.

19 THE WITNESS: At one point I saw that number in  
20 that 17-page document, yes.

21 BY MS. CONNOLLY:

22 Q. Did you know what that meant?

23 A. No.

24 Q. Did he explain to you what a base offense -- an  
25 adjusted offense level 40 meant?

—TRANSCRIBED FROM DIGITAL RECORDING—

1 A. No.

2 Q. No? Did he tell you that under the United States  
3 Sentencing Guideline based on the enhancements that were  
4 agreed upon, the sentencing guideline range was 24.3 to 30  
5 years?

6 A. No.

7 Q. Did he explain to you that based upon facts that  
8 were stipulated to, there could be additional enhancements  
9 that might apply?

10 A. I wouldn't know in the first place about  
11 enhancements, so if he would talk about -- that whole  
12 concept wasn't clear back then.

13 But, no, he didn't.

14 Q. So you've never had any -- you testified previously,  
15 you've never had discussions about the guidelines or  
16 enhancements or anything of that nature previously?

17 A. No. And to make that clear, the beginning of that  
18 meeting was still about if -- if to take a plea.

19 Q. Because you had --

20 A. So that took some time. It was not like they came  
21 in at the thing and started. It was still me, like -- this  
22 was the first -- the day before ended with there is no  
23 plea. I went home and had a sleepless night and came the  
24 next morning and was still prepared to continue trial.

25 It was not -- it's not that I had a decision in

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1 my mind. It was just a possibility, an --

2 Q. Well, why did you --

3 A. An option.

4 Q. -- not decide to proceed to trial and to take the  
5 guilty plea?

6 A. I thought I had no other option --

7 Q. Why?

8 A. -- at that point.

9 Because --

10 Q. Well, the judge said you could either plea or you go  
11 to trial; right? So why did you not just proceed with the  
12 trial?

13 A. No, because it -- I lost trust in that team when  
14 they came with the plea.

15 No new facts have been brought up. Everything  
16 was -- was clear. There was -- the government didn't bring  
17 anything new in, which me and the defense team wouldn't  
18 be -- wouldn't know, wouldn't have known.

19 I mean, if it was all new -- and that's why I  
20 didn't understand when they came with a plea, the --

21 Q. There was --

22 A. It's like --

23 Q. There was no surprising testimony? Is that what  
24 you're saying?

25 A. Not for me.

TRANSCRIBED FROM DIGITAL RECORDING

1 Q. Okay. So you --

2 A. I mean, for them --

3 Q. -- were surprised --

4 A. -- obviously.

5 Q. So you were surprised --

6 MS. ROOHANI: Objection. Calls for speculation.

7 THE COURT: Sustained.

8 BY MS. CONNOLLY:

9 Q. So you were surprised because -- let me strike that.

10 There was nothing surprising from the evidence  
11 that you had seen presented; right? There was nothing that  
12 you hadn't anticipated being presented by --

13 A. No.

14 Q. -- the government?

15 A. No.

16 Q. Okay. And yet here they were saying, "We need to  
17 talk negotiation"?

18 A. Yes.

19 Q. Okay. And so --

20 A. At the worst moment for me. I mean, in the -- it's  
21 like something breaks apart, like a building breaks apart  
22 in front of me.

23 The first thought I had, "Oh, my God, Nadig was  
24 right."

25 MS. ROOHANI: Objection. Nonresponsive.

~~TRANSCRIBED FROM DIGITAL RECORDING~~

1 BY MS. CONNOLLY:

2 Q. You indicate "Nadig was right." What do you mean by  
3 that?

4 A. With what he said earlier about defenses and the  
5 anticipated defense and the team and that they were  
6 unprepared and --

7 MS. ROOHANI: Objection. Hearsay.

8 MS. CONNOLLY: It's not for the truth of the  
9 matter.

10 THE WITNESS: There were also mistakes which  
11 I --

12 THE COURT: It is.

13 MS. CONNOLLY: You need to let the judge rule on  
14 the objection.

15 THE WITNESS: All right.

16 THE COURT: And it is for the truth of the  
17 matter asserted. So it's sustained.

18 BY MS. CONNOLLY:

19 Q. That's how he made you feel. You felt that --

20 A. Yes.

21 Q. Okay. So their reaction in conjunction with  
22 comments that had been made by Mr. Nadig to you in person  
23 and the e-mail made you feel, what, that you need to go to  
24 trial, or you need to take a plea?

25 A. That I take a plea.

—TRANSCRIBED FROM DIGITAL RECORDING—

1 Q. And what was your understanding of your exposure  
2 under the guilty plea?

3 MS. ROOHANI: Objection.

4 BY MS. CONNOLLY:

5 Q. In other words --

6 MS. ROOHANI: Asked and answered.

7 BY MS. CONNOLLY:

8 Q. -- the time you were facing?

9 MS. ROOHANI: Asked and answered.

10 THE COURT: Overruled. He can answer the  
11 question.

12 BY MS. CONNOLLY:

13 Q. What was your understanding of how much -- after  
14 you -- after Mr. Marchese -- after Mr. Durham -- so it's  
15 your testimony he came and paraphrased the guilty plea  
16 agreement to you?

17 A. Yes.

18 Q. How much time did you think you were facing?

19 A. Something, yeah, between 5 and 15 years.

20 Q. When did you -- when was the first time you actually  
21 found out your exposure? When was the first time that  
22 anybody actually sat down and went over and explained to  
23 you, if you look at the guilty plea agreement that's in  
24 front of you --

25 A. I -- is it here?

—TRANSCRIBED FROM DIGITAL RECORDING—

1 Q. The guilty --

2 A. I wanted to take it, but I didn't.

3 Q. It should be in front of you. Guilty plea.

4 MS. CONNOLLY: May I approach, Your Honor?

5 THE COURT: Yes, you may.

6 MS. CONNOLLY: Exhibit G.

7 BY MS. CONNOLLY:

8 Q. Turn to page 7. 7 through page 8.

9 When did you first find out what this all meant?

10 A. I had an idea the next day.

11 Q. The next day. When you talked about the  
12 enhancements and the points. When did this -- when did --

13 A. The next day means after I took the plea, when I  
14 went back to the jail, that night and the next morning.

15 Q. And that was based upon a conversation that you had  
16 with somebody at the jail --

17 A. Yes.

18 Q. -- facility?

19 And what did you do when you found out what that  
20 base offense level 40 meant? In terms of years?

21 A. The next morning I called Jess.

22 Q. And what did you tell him?

23 A. I said, "Jess, is there any -- I didn't understand  
24 that, and is there any way to -- to -- because it's a day  
25 later, can you go to the judge and say, 'Well, he didn't

—TRANSCRIBED FROM DIGITAL RECORDING—

1 understand it, he wants to undo it'?"

2 Q. So that was the day after you had a --

3 A. The morning after, yeah, when --

4 Q. The morning after you had a --

5 A. -- I had dayroom --

6 Q. -- discussion --

7 A. -- I went to the phone, yes.

8 Q. And then he came and met with you; right?

9 A. Yes.

10 Q. And then as a result of that conversation, did  
11 you -- was it determined you need to find other counsel?

12 A. Say it again?

13 Q. After that conversation, was it determined that you  
14 need to find other counsel?

15 A. Not at that meeting. That was a little bit later.  
16 He came with Mr. Pacitti together --

17 Q. Okay.

18 A. -- on that day.

19 Q. Okay. At any point in time did anybody, prior to  
20 me, explain to you how the United States Sentencing  
21 Guidelines worked?

22 A. Yes.

23 Q. And was that a lawyer or a nonlawyer?

24 A. No.

25 Q. Nonlawyer?



—TRANSCRIBED FROM DIGITAL RECORDING—

1 A. It was a nonlawyer.

2 Q. And who was that?

3 A. It was Mr. Humphries.

4 Q. And that was the person you talked to back at the  
5 jail facility after you entered your plea?

6 A. I came back that night and passed by that -- we are  
7 neighbors. But it's like a solitary confinement.

8 Q. Without saying what he said to you.

9 A. Okay. So I came back. I just explained how that is  
10 there. They are like 16 cells. And I passed by his door,  
11 because I was his neighbor. And through the door you can  
12 communicate.

13 And I can't say what I said, huh?

14 Q. Yes.

15 A. So I said, "Well, I had to take a deal." And then  
16 we talked about that a little.

17 And after that conversation, I knew that there  
18 is a little bit more to it.

19 But then over the PA they said, "Fuechtener  
20 lockdown" because I just -- it wasn't my dayroom, I came  
21 from court. So I could just talk with him for, like, two  
22 minutes.

23 So I went to my cell, and then when I had my  
24 next dayroom, my hour dayroom, I went out and talked again  
25 to him, and then we had more time.

—TRANSCRIBED FROM DIGITAL RECORDING—

1 Q. And what did you tell him about your understanding  
2 of the plea agreement?

3 A. Based on a question he asked --

4 Q. No, my question was --

5 A. What did I tell him?

6 Q. -- what did you --

7 A. I told him that there are no years in that plea  
8 deal.

9 Q. There's no years --

10 A. There's no years which -- there is no -- there is no  
11 such sentence which says about government and we, we all  
12 asked for a sentence of blah, blah, blah.

13 Q. Okay.

14 A. Of whatever year.

15 Q. What did he --

16 A. So there was nothing in it. There was no years in  
17 it. There was no sentence in it.

18 Q. What did you tell him was your understanding of the  
19 number of years you were facing with an adjusted offense  
20 level of 40?

21 A. What my understanding was?

22 Q. Yes.

23 A. After that -- after --

24 Q. What did you tell --

25 A. -- what I learned?

—TRANSCRIBED FROM DIGITAL RECORDING—

1 Q. -- him was your understanding of what a base  
2 level -- adjusted offense level 40 --

3 A. I had no understanding about that.

4 Q. That's what you said to him, "I don't know what base  
5 offense level 40 means"?

6 A. Yes.

7 Q. And after your discussion --

8 A. I mean, he asked me --

9 Q. Without saying what he said.

10 A. He asked me --

11 MS. ROOHANI: Objection. Hearsay.

12 MS. CONNOLLY: Without saying what he said. You  
13 can't --

14 THE WITNESS: I can't say that he asked me. Oh,  
15 I can't say what he said. Okay.

16 BY MS. CONNOLLY:

17 Q. Did you make any comment to Mr. Humphries --

18 A. I learned -- I didn't know about -- I knew about the  
19 40. I knew there is a number 40 points which I could  
20 state, but I didn't know that that would relate to a  
21 sentence --

22 Q. You didn't know --

23 A. -- to years and months.

24 Q. You didn't know that that was 24.3 --

25 A. No --

—TRANSCRIBED FROM DIGITAL RECORDING—

1 Q. -- to 30 years?

2 A. -- I didn't know that -- that could be -- for me  
3 that was a number 40 between -- it could be, like, halfway  
4 between zero and a hundred. Like, I had no concept of that  
5 number.

6 Q. So it was your testimony that prior to receiving the  
7 presentence investigation report, you contacted counsel and  
8 told them that you wanted to withdraw your plea?

9 A. Yes.

10 Q. And that was after --

11 A. Several counsel --

12 Q. And that was after --

13 A. -- I contacted.

14 Q. -- you had discussions with Mr. Humphries?

15 A. Yes.

16 Q. Are you aware of whether or not Mr. Humphries is  
17 aware of the United States Sentencing Guidelines and how  
18 they apply in child pornography cases?

19 MS. ROOHANI: Objection. Calls for speculation.

20 MS. CONNOLLY: I asked if he was aware.

21 MS. ROOHANI: Calls for speculation.

22 MS. CONNOLLY: It's not for the truth of the  
23 matter.

24 THE COURT: If he's aware of what?

25 MS. CONNOLLY: If he -- I can't remember what

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1 the question was. If he knew whether or not Mr. Humphries  
2 was aware of how the sentencing guidelines work in child  
3 pornography cases.

4 THE COURT: Did you believe Mr. Humphries  
5 understood the guidelines?

6 MS. CONNOLLY: I can do that.

7 BY MS. CONNOLLY:

8 Q. Did you believe that Mr. Humphries understood the  
9 guidelines and how they work?

10 A. Yes.

11 Q. And how did you feel about the information that he  
12 provided to you? Or how did it make you feel in relation  
13 to the fact that you had already pled guilty?

14 A. I knew that I got to do something. I couldn't  
15 look -- after from what I learned, I wanted to look it up,  
16 but I couldn't look that up in Henderson. I couldn't look  
17 up what that would mean.

18 Q. If you had known the base offense level was a  
19 sentencing guideline range of 24.3 to 30 years and the  
20 Court could only go below that if the Court decided to do a  
21 departure or variance, would you have entered the guilty  
22 plea?

23 MS. ROOHANI: Objection. Calls for speculation.

24 MS. CONNOLLY: No, it doesn't.

25 THE COURT: So you're asking him knowing --

~~TRANSCRIBED FROM DIGITAL RECORDING~~

1 MS. CONNOLLY: If he knew what the actual  
2 guideline range was in terms of years, would he have  
3 accepted the guilty plea.

4 THE COURT: I think it is speculation. But you  
5 can ask him now that he knows a little bit more --

6 MS. CONNOLLY: Okay.

7 BY MS. CONNOLLY:

8 Q. Once you found out what -- let me ask -- because I  
9 asked you two questions.

10 Once you found out that under United States --  
11 under the sentencing table the guideline range was 24.3 to  
12 30 months, would you take a deal for that?

13 A. No.

14 Q. Okay. And what about are you aware of the fact that  
15 the Court can actually give you a guideline range that's  
16 higher than that? Were you aware of that?

17 A. No.

18 Q. Okay. Were you aware that the Court could rely upon  
19 some of the facts that were contained in your guilty plea  
20 agreement and go higher than an adjusted offense level of  
21 40? Were you aware of that?

22 A. No.

23 Q. Were you aware that based upon the facts that you  
24 had stipulated to in the guilty plea agreement, that your  
25 guideline range was actually life?

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1 A. No.

2 Q. If you had known that, would you have pled guilty?

3 A. No. Actually how I felt, I mean, to --

4 Q. But there's no --

5 A. Okay.

6 MS. CONNOLLY: Court's indulgence.

7 THE COURT: Well, you know what, it's 5:00. So  
8 why don't we just take our recess. And that way you can  
9 think about whether or not you need to ask more questions.

10 MS. CONNOLLY: Thank you.

11 THE COURT: We will continue, remind me, Aaron,  
12 was it this Friday at 1:30?

13 COURTROOM ADMINISTRATOR: Yes, Your Honor.

14 THE COURT: All right. So this Friday, April  
15 20th, at 1:30 p.m. here in this courtroom, 7D.

16 MS. CONNOLLY: Can I ask how late you'll go on  
17 Friday, just so I know for trial purposes?

18 THE COURT: How late do you want to go? Do you  
19 want to go 4:30 instead of 5:00?

20 MS. CONNOLLY: 4:30.

21 THE COURT: All right. So we'll do 4:30 on  
22 Friday.

23 MS. CONNOLLY: Thank you.

24 MS. ROOHANI: Your Honor, is the separation  
25 order between Mr. Fuechtener and Mr. Humphries still in

~~TRANSCRIBED FROM DIGITAL RECORDING~~

1 effect?

2 THE COURT: It should still be in effect. Did I  
3 have a -- did I have a date on there for when it expired?

4 MS. ROOHANI: I didn't even see the order, Your  
5 Honor. But I don't know how it went to the marshals.  
6 That's why I was just double checking.

7 THE COURT: All right. We'll enter a minute  
8 order, Aaron, that the order is still in effect --

9 MS. ROOHANI: Thank you, Your Honor.

10 THE COURT: -- declaring the marshals to keep  
11 him separate from the witness, Mr. Humphries.

12 COURTROOM ADMINISTRATOR: And, Your Honor --

13 THE COURT: -- until --

14 COURTROOM ADMINISTRATOR: -- for clarification,  
15 I can include that in the minutes today. They were in the  
16 minutes last time.

17 Will the writ also be continued to this Friday  
18 so that Mr. Humphries can be brought back?

19 THE COURT: Yes, please.

20 COURTROOM ADMINISTRATOR: Okay.

21 MS. CONNOLLY: Thank you.

22 THE COURT: All right. So we will go ahead and  
23 take our evening break and go off record.

24 COURTROOM ADMINISTRATOR: Off record.

25 (The proceedings concluded at 5:10 p.m.)



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I certify that the foregoing is a correct  
transcript from the electronic sound recording  
of the proceedings in the above-entitled matter.



4/30/18

Donna Davidson, RDR, CRR, CCR #318  
Official Reporter

Date